129

No. 08-

Supreme Court, U.S.
FILED
081447 MAY 19 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and LYNNE A. OSMUS, Acting Administrator, and CITY OF CHICAGO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH V. KARAGANIS
Counsel of Record
A. BRUCE WHITE
JOHN W. KALICH
KARAGANIS, WHITE & MAGEL LTD.
414 N. Orleans Street, Suite 810
Chicago, Illinois 60654
(312) 836-1177

Counsel for Petitioners

QUESTION PRESENTED

Whether Petitioners, whose sacred religious cemetery will be desecrated and destroyed by the proposed expansion of O'Hare Airport – a project to be funded by billions of dollars authorized by the FAA – have Article III standing to enforce compliance by FAA with the protections afforded by the Religious Freedom Protection Act, 42 U.S.C. §2000bb, *et seq.*

PARTIES TO THE PROCEEDINGS

Petitioners are St. John's United Church of Christ, Helen Runge, and Shirley Steele. They were petitioners in the United States Court of Appeals for the District of Columbia Circuit.

Respondents are the Federal Aviation Administration, and Lynne A. Osmus, Acting Administrator; and the City of Chicago (Intervenor for Respondent).

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

INTRODUCTION 2

STATEMENT OF THE CASE 8

A. Facts 8

B. Proceedings Below 12

1. The prior permitting and grant cases . 12

2. The proceedings immediately below ... 15

REASONS FOR GRANTING THE WRIT 16

I. THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THIS COURT 16

II. THE COURT OF APPEALS' DECISION EVISCERATES THE RFRA PROTECTION MANDATED BY CONGRESS 22

III. THE COURT OF APPEALS' DECISION CREATES PRECEDENT FOR EVISCERATION OF ENVIRONMENTAL PROTECTION LAWS ACROSS THE BOARD 24

CONCLUSION 27

TABLE OF CONTENTS-Continued

APPENDICES

APPENDIX A:

Opinion of the Court of Appeals, dated December 19, 2008 ..... 1a

APPENDIX B:

Order Denying Petition For Panel Rehearing dated February 19, 2009 ..... 13a

Order Denying Petition For Rehearing En Banc dated February 19, 2009 ..... 14a

APPENDIX C:

Village of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006) 15a

APPENDIX D:

St. John's United Church of Christ v. FAA, 520 F.3d 460 (D.C. Cir. 2008) 62a

TABLE OF AUTHORITIES

CASES

Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996) 19

Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821) 24

Davis v. HUD, 627 F.2d 942 (9th Cir. 1980) 19

Desert Citizens Against Pollution v. Bisson, 231 F.3d 1172 (9th Cir. 2000) 19

Franklin v. Massachusetts, 505 U.S. 788 (1992) 5. 17, 18

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 22

International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795 (D.C. Cir. 1983) 20

Jackson v. District of Columbia, 254 F.3d 262 (D.C. Cir. 2001) 22

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 4

Marshall v. Marshall, 547 U.S. 293 (2006) 24

National Parks v. Manson, 414 F.3d 1 (D.C. Cir 2005) 18

Sierra Club v. Franklin County Power of Illinois, 546 F.3d 918 (7th Cir. 2008) 19

St. John's United Church of Christ v. FAA, 520 F.3d 460 (D.C. Cir. 2008) 13

TABLE OF AUTHORITIES - Continued

Utah v. Evans, 536 U.S. 452 (2002) 5, 17, 18

Village of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006) 5, 6, 11, 12, 14, 23

STATUTES

28 U.S.C. §1254(1) 2

40 U.S.C. §40117 3

42 U.S.C. §2000bb-1. 2

42 U.S.C. §2000bb, *et seq.* 3

42 U.S.C. §2000bb-1(a) 22

42 U.S.C. §2000bb-1(b) 22

42 U.S.C. §2000bb-1(c) 23

49 U.S.C. §303(c) 26

49 U.S.C. §46110 15

49 U.S.C. §47101 *et seq.* 3

49 U.S.C. §47107(a)(16) 10

OTHER AUTHORITIES

Wright & Miller, 13 Fed. Prac. & Proc. Juris. 2d §3531.6 19

IN THE
Supreme Court of the United States

No. 08-

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and LYNNE A. OSMUS, Acting Administrator, and CITY OF CHICAGO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

St. John's United Church of Christ ("St. John's") and two of its members, Helen Runge and Shirley Steele (collectively "Petitioners"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the District of Columbia Circuit dismissing Petitioners' claim that the Federal Aviation Administration ("FAA") violated the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §2000bb-1, is reported at 550 F.3d 1168 and reprinted in the appendix hereto ("App.") at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 2008. App. 1a. A timely petition for rehearing and rehearing *en banc* was denied on February 19, 2009. App. 13a-14a. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

INTRODUCTION

The City of Chicago asserts that it will build a 14.3 billion dollar project to expand O'Hare Airport, which is depicted in the "Airport Layout Plan" submitted by Chicago and approved by FAA in 2005. App. 19a, 21a; JA-09048.

The expansion project proposes to destroy St. Johannes Cemetery, an historic religious cemetery owned by Petitioner St. John's. A central tenet in the religious beliefs and practices of St. John's and its congregation is the belief that the graves in the consecrated ground of St. Johannes must not be disturbed until Jesus Christ raises the dead on the Day of Resurrection. Destruction of St. Johannes and removal of the graves will violate the religious beliefs and practices of St. John's and its congregation. App. 2a.

Under Chicago's proposal, FAA is scheduled to provide for the O'Hare airport expansion several billion dollars in federally authorized financial assistance, in grants pursuant to 49 U.S.C. §47101 *et seq.,* and in federally authorized passenger facility charges ("PFCs") pursuant to 40 U.S.C. §40117.[1]

The Religious Freedom Restoration Act. 42 U.S.C. §2000bb, *et seq.,* prohibits the federal government from imposing a substantial burden on the exercise of religion unless the federal government proves: (a) that the harm to religion is in furtherance of a compelling governmental interest; and (b) the alternative that harms religion is the least restrictive means of furthering that compelling governmental interest.

Chicago has already requested and received in excess of $1.3 billion in federal grants and federal PFC authorizations for the airport expansion project. JA-09185. The decision below stems from Petitioners' RFRA challenge to an FAA decision to authorize $1.282 billion in PFCs specifically

---

[1] According to Chicago's 2004 estimate, the cost for the expansion project is $14.29 billion. Of that amount Chicago states that $891,690,000 will come from federal grants and $3.123 billion will come from federally approved PFCs. According to Chicago, the remainder will supposedly come from $8.8 billion dollars in airline authorized bonds and $1.4 billion in private investment. At the time this Petition has been filed the airlines have refused to agree to any further airline backed bonds beyond $1.8 billion in such bonds previously authorized for the initial phase of the expansion. JA-09048; JA-09119; Addendum to Petition for Rehearing, at A-15 to A-23.

designated for elements of the project that include destruction of St. Johannes Cemetery.

The Court of Appeals never reached the substantive underlying question as to FAA's RFRA compliance because it concluded that Petitioners lacked standing. Standing requires: (1) an "injury in fact"; (2) a causal connection between the injury and the conduct complained of; and (3) it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The decision below rested solely on the third element of standing, in a purported failure of "redressability." App. 4a. The Court of Appeals ruled that there was no "redressability" because it accepted Chicago's claim that if the PFC approval were denied by FAA Chicago could obtain the $1.282 billion elsewhere (and presumably the additional billions in federal grant and PFC funds required for the overall project as well). Therefore, the Court of Appeals assumed that Chicago would destroy St. Johannes Cemetery even if no federal funds were available.

The Court of Appeals held that there was no redressability despite the likelihood that Chicago would comply with an FAA directive to preserve St. Johannes, just as Chicago had complied with an FAA directive to save a similar religious cemetery (Rest Haven Cemetery) also in the path of O'Hare expansion.

Certiorari is warranted in this case for several reasons.

Certiorari is warranted because the Court of Appeals' finding of no redressability (and therefore no Article III standing) conflicts with the this Court's decisions in *Utah v. Evans*, 536 U.S. 452, 463-64, (2002), and *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Consistent with *Utah v. Evans* and *Franklin v. Massachusetts*, given the strong likelihood that Chicago would comply with any decision by FAA (or by the Court of Appeals) that the Petitioners were entitled to substantive protection under RFRA, the Court of Appeals should have recognized presumptive redressability for purposes of standing.

Certiorari is also warranted because the issue of standing redressability, as applied by the Court of Appeals, has devastating implications for RFRA protection in federal funding programs for actions by non-federal actors that are destructive of religious practice, in a host of other activities ranging, *e.g.*, from highways to sewage treatment plants.

The decision below arises in the immediate context of a prior related decision by D.C. Circuit that an FAA permit-type approval of Chicago's proposed "Airport Layout Plan" ("ALP") for the same expansion project did not trigger a RFRA obligation because (according to the Court of Appeals) the FAA approval did not constitute sufficient "encouragement" or "coercion" to implicate FAA in Chicago's decision to destroy St. Johannes. *Village of Bensenville, et al. v. FAA*, 457 F.3d 52 (D.C. Cir. 2006). App. 31a.

The *Village of Bensenville v. FAA* ruling effectively means that federally required

permitting for actions by non-federal actors that injure religion will not trigger RFRA religious protection obligations in the federal permitting agency under any circumstances. As discussed *infra*, this unfavorable treatment of religious protection is in sharp contrast to the law applied to federal permitting approval for environmentally destructive actions by non-federal actors, which triggers both federal agency responsibility and Article III standing in the courts to enforce environmental statutes.

Village of Bensenville v. FAA left undecided whether billions of dollars in federally authorized *funding* of a project executed by non-federal actors that imposes a substantial burden on the exercise of religion was sufficient federal "encouragement" or involvement to implicate RFRA.

Now the Court of Appeals decision below has created a an even larger evasion of Congress's RFRA directive to protect the exercise of religion. Under a pretext of a lack of "redressability," the Court of Appeals below has effectively eviscerated RFRA as a substantive protection against religious harm caused by federally funded projects – even where the federal government provides more than $1 billion in federally authorized funds for the project that harms religious exercise, and where billions more in federally authorized funding is projected.

Taken together, the Court of Appeals' decisions in *Village of Bensenville v. FAA* and in the decision below virtually assure that there will be no RFRA protection for any federally permitted or federally funded project undertaken by a non-federal third

party, regardless of the burden it places on religious exercise.

In enacting RFRA, Congress mandated that the federal judiciary apply strict scrutiny against federal action that substantially burdens religious exercise.

But in using the jurisdictional device of redressability as a rationale for refusing to enforce RFRA's substantive protections against FAA's $1.282 billion funding authorization (on the theory that the third party recipient can get the $1.282 billion elsewhere), the Court of Appeals has eviscerated substantive religious protection under RFRA. By refusing to enforce RFRA's substantive protections against FAA's $1.282 billion funding authorization, the Court of Appeals also has ignored its own Article III responsibility to exercise the jurisdiction mandated by Congress.

The stark irony here is that the Court of Appeals ruling uses standing to deny enforcement of religious protection under RFRA, while federal funding programs for airports, highways and a host of other projects by non-federal actors are subject to protection and judicial enforcement of various federal environmental laws. Is congressionally mandated protection of religious rights entitled to less judicial enforcement than environmental laws?

Finally, if judicial enforcement of environmental laws are to be on equal footing with judicial protection of religious laws, certiorari is warranted because of the potential application the ruling below to violations of federal environmental laws. The Court of Appeals' ruling establishes a dangerous new precedent for an ultimate dramatic

weakening other statutory protections, such as in environmental statutes, in cases involving federal funding for an array of third party projects (such as highways, rail, sewage treatment plants and other federally funded state and local projects).

Local governments wishing to build federally funded projects that will destroy precious parks, wetlands and historic sites will be able to avoid judicial enforcement of federal environmental laws altogether by merely claiming that they have alternative sources of funds, as Chicago has done here to avoid RFRA. Under the Court of Appeals' decision below, claims for judicial enforcement of environmental protection laws will be dismissed for lack of Article III redressability, simply on a representation by the non-federal actor that it can (but ultimately need not) get the money from non-federal sources.

Indeed, given the Court of Appeals ruling, Chicago is moving forward to spend the $1.282 billion in federally authorized PFC dollars and is threatening to use those federally authorized dollars to destroy St. Johannes Cemetery – while Petitioners are denied the benefit of congressionally mandated RFRA protection.

STATEMENT OF THE CASE

A. Facts.

St. John's United Church of Christ is a Christian Church established in Bensenville in 1849. St. Johannes Cemetery, the cemetery for St. John's and its congregation, dates back to the Church's founding. The consecrated ground of St.

Johannes contains the remains of about 1,300 departed adherents of this faith.

St. John's holds a central belief that on the Day of Resurrection the bodies of Christian believers will be resurrected to live with God. Church members believe that because God ordained St. Johannes as their loved ones' final resting place, the remains should not be disturbed until Judgment Day. They believe that the participation of the deceased members in the Day of Resurrection would be impaired if their remains were removed from the consecrated ground in which they were placed to await resurrection. Neither FAA nor Chicago questions the *bona fides* of these beliefs. App. 3a.

Among the Church's members who hold to these beliefs are petitioners Helen Runge and Shirley Steele. Mrs. Runge, now in her 80s, was baptized, married in, and intends to have her funeral at St. John's. About 25 of Mrs. Runge's relatives, including her husband and infant son, are buried at St. Johannes. Mrs. Runge visits St. Johannes to honor those buried there; she also owns a plot next to her husband, where she intends to be buried. She believes that disturbing the graves of her husband and son would be a sacrilege. Likewise, Mrs. Steele visits St. Johannes to care for and exercise her beliefs at the graves of her grandparents and others.

Chicago has proposed a $14.29 billion expansion plan for O'Hare International Airport involving, among other things, the construction of new runways and the modification and/or relocation of existing runways. JA-09047. This expansion plan

included acquisition and destruction of two religious cemeteries: the Rest Haven Cemetery; and St. Johannes Cemetery. Both St. John's and the owners of Rest Haven Cemetery sought to protect their religious cemeteries, maintaining rights to protection under RFRA from a substantial burden on religious exercise.

Chicago submitted its proposed expansion plan to the FAA for its approval, in the form of approval of an "Airport Layout Plan" ("ALP"), pursuant to 49 U.S.C. §47107(a)(16). In 2005, FAA approved the ALP. In that approval the FAA agreed that the destruction of Rest Haven Cemetery and St. Johannes Cemetery would impose a substantial burden on the exercise of religion within the meaning of RFRA.

The FAA further concluded, under the substantive strict scrutiny framework of RFRA, that there was not a sufficient compelling governmental need to justify the destruction of Rest Haven Cemetery, and directed Chicago to modify its plan to preserve Rest Haven. App. 21a.

But as to St. Johannes the FAA concluded, based on computer modeling studies that did not evaluate any non-destructive alternatives, that there was a compelling governmental need that required the destruction of St. Johannes.[2] FAA

---

[2] FAA used computer modeling studies to compare the performance of various runway alignment alternatives that would destroy St. Johannes. However, FAA never conducted any such computer modeling to compare the aviation performance of Chicago's proposal with any of the alternatives that would preserve St. Johannes. JA-09172.

allowed Chicago to include the destruction of St. Johannes as an element of the FAA-approved ALP. App. 12a.

As observed by the Court of Appeals in proceedings below (App. 1a), this is the final of a series of attempts by Petitioners to obtain the identical RFRA protection of religious exercise at St. Johannes Cemetery that was afforded by FAA to Rest Haven Cemetery. In each case, including the immediate proceedings below, Petitioners were denied substantive review of the FAA actions burdening their religious exercise, because the Court of Appeals ruled that Petitioners had not cleared one or more of a series of jurisdictional or procedural hurdles.[3] While these were separate actions, the Court of Appeals in its opinion immediately below tacitly incorporated factual findings in the prior cases, making them essential to the review sought in this case. For clarity's sake this series of jurisdictional and procedural rejections of Petitioners' RFRA claim are described in the following summary of Proceedings Below, and are included in the Appendix to this Petition.

The immediate jurisdictional rejection of Petitioners' RFRA claim that is the subject of this Petition for a Writ of Certiorari is the Court of Appeals' December 19, 2008, determination

---

[3] The only occasion on which there has been a substantive review of their Petitioners' RFRA claim was in the dissenting opinion in *Village of Bensenville, et al. v. FAA*, 457 F.3d 52 (2006). App. 51a-61a. The dissenting judge concluded that the majority should have reached the merits, and that FAA had not met the strict scrutiny requirements of RFRA.

(rehearing denied February 19, 2009) that Petitioners lacked standing, for lack of redressability, to challenge FAA's authorization of $1.282 billion for the project. App. 1a.

B. Proceedings Below.

1. The prior permitting and grant cases.

Village of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006). App. 15a. This case involved two consolidated challenges to FAA actions based on violations of RFRA. Petitioners challenged FAA's approval of the ALP (effectively a permit), which included destruction of St. Johannes. Petitioners asserted that FAA was required to comply with RFRA in making its ALP approval decision.

Petitioners also challenged FAA's 2005 issuance of a "Letter of Intent" ("LOI") to grant $337 million in initial federal funding (in 15 annual installments) for Chicago's airport development project. App. 40a.

In a 2-1 decision, the Court of Appeals declined to reach the substance of either of Petitioners' claims that FAA had not properly applied RFRA strict scrutiny. Regarding the ALP approval, the majority held that approval of the plan was not sufficient federal action to attribute the cemetery destruction to FAA. App. 40a. The Court of Appeals held that the approval by the FAA of the ALP did not constitute the required degree of federal "coercion" or "encouragement" to attribute the destructive actions of Chicago to the FAA; and that therefore the FAA's ALP approval decision had not contributed to the destruction of St. Johannes.

Regarding the LOI, the Court of Appeals ruled that this was not a reviewable "final agency action," because the actual immediate disbursement of funds was subject to a further annual grant application process, and also was subject to congressional appropriations that would occur in subsequent fiscal periods. App. 42a. The Court further stated in dictum that even if there were a final order, there would be no Article III standing because Chicago had stated that it could obtain the $337 million elsewhere. App. 43a-44a.

The dissenting panel member concluded that the ALP approval of St. Johannes destruction was federal action subject to RFRA and that FAA had failed to correctly apply RFRA strict scrutiny. App. 60a.

St. John's United Church of Christ v. FAA, 520 F.3d 460 (D.C. Cir. 2008). App. 62a. The first annual grant in the $337 million LOI – a grant for $29.3 million – was awarded in 2006. Petitioners filed a petition for review of this final agency action.

While this petition was pending, FAA authorized $1.282 billion in PFC funding for the very same project that was the subject of the $337 million LOI funding. Petitioners then sought review of the PFC funding approval, and moved for consolidation of the petitions.

The legal and factual bases for the two petitions were largely common. Both the $337 LOI and the $1.282 PFC approval were for funding of the project that would destroy St. Johannes Cemetery. In both cases, Petitioners maintained that FAA had not properly applied RFRA strict scrutiny.

Notwithstanding the common issues (and contrary to the prior consolidation in *Village of Bensenville v. FAA*), the Court of Appeals denied consolidation and treated the $29.3 million LOI grant segment as a stand-alone matter.

The piecemeal payment of the $337 million LOI funds over 15 years of annual grants, and the Court of Appeals' choice of piecemeal review, thus created for Petitioners a dilemma in ever obtaining meaningful vindication of their RFRA rights. Under the FAA-Chicago grant funding arrangement, the grants were to be processed as reimbursement for segments of the airport development after they were completed by Chicago. Thus, in theory, the segment of the FAA grant funding nominally designated for the destruction of St. Johannes would only occur after the cemetery was irreversibly desecrated and destroyed.

The Court of Appeals again avoided reaching the merits of Petitioners' RFRA claim, under several rationales. First, the Court emphasized that the $29.3 million grant segment was reimbursement for work on a portion of the project that was located some distance from St. Johannes. App. 65a. The Court allowed this segmentation even though the $337 LOI expressly covers work that will destroy St. Johannes. The Court held that neither the balance of the $337 LOI nor the $1.282 billion in PFCs were before the Court. App. 65a-66a.

Ultimately, the Court of Appeals held that there was no Article III redressability because there was no showing by Petitioners that if the Court overturned the $29.3 million grant, Chicago would

not destroy St. Johannes. The Court noted that the $29.3 million was a small portion of the $337 million LOI and Chicago could replace the $29.3 million with other sources of funding. App. 67a.

2. The proceedings immediately below.

In 2007 FAA authorized $1.282 billion in PFC funding for the airport expansion project, which includes destruction of St. Johannes Cemetery. App. 1a. Petitioners sought review, maintaining that FAA's action in authorizing the $1.282 billion for a project that would destroy St. Johannes did not meet the RFRA strict scrutiny test.[4]

At this point several jurisdictional and procedural barriers to review imposed in the prior actions no longer existed. There was clearly a final federal "order" upon which the jurisdictional grant of 49 U.S.C. §46110 rested. The prior segmentation rationale – *i.e.,* that the money was for other segments of the project and not for the destruction of St. Johannes – was no longer valid because the PFC authorization clearly included the runway that would destroy St. Johannes.

Moreover, there existed substantial uncontroverted evidence that Chicago would abide by any order entered by FAA relating to RFRA protection of St. Johannes. Chicago had already complied with FAA's directive to preserve Rest Haven Cemetery, consistent with FAA's RFRA strict scrutiny analysis. This evidence made it

---

[4] As noted above, the Court of Appeals had refused to consolidate the $1.282 billion PFC authorization with the then pending petition to review the $29.3 million FAA grant.

likely that Chicago would honor an FAA directive to preserve St. Johannes, if on remand FAA conditioned approval of the $1.282 billion PFC application on RFRA protection for St. Johannes.

The Court of Appeals nevertheless declined to address the merits of the Petitioners' RFRA claim, based on a purported failure to satisfy the redressability element of standing. App. 4a. Petitioners sought rehearing and rehearing *en banc* in the Circuit Court, which was denied on February 19, 2009. App. 13a-14a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS OF THIS COURT.

According to the Court of Appeals, a petitioner cannot establish Article III standing when seeking to invalidate a federal agency's decision to provide funding under a federal statute as long the recipient of the federally approved funds asserts that it can obtain the money elsewhere and inflict the harm with non-federal money. The Court of Appeals made this ruling in the face of evidence in this case that Chicago would likely follow the directive of FAA or the Court of Appeals on remand if the Court of Appeals ruled in Petitioners' favor.

The decision of the Court of Appeals on the redressability component of standing directly conflicts with decisions of this Court on an important federal question.

The redressability standing precedents of this Court make it clear that where it is likely that the non-party actor will modify its behavior to reflect

and follow the decision of the federal actor, there is redressability under Article III. Here it is highly likely that Chicago would follow the direction of the FAA that is consistent with any relief ordered by a court pertaining to RFRA issues.

Indeed, it is clear from Chicago's prior conduct in dealing with the FAA's decision on the Rest Haven Cemetery that Chicago will follow FAA's decisions and directives as to RFRA. Chicago's original proposal called for the destruction of two religious cemeteries: St. Johannes and Rest Haven. Applying RFRA, FAA decided that Rest Haven Cemetery should be spared. Chicago complied with FAA's direction sparing Rest Haven; and it is highly likely that that Chicago would comply with a similar directive from FAA as to St. Johannes. This is especially true given that, as consistency would require, FAA could condition the approval of the present $1.282 billion in PFCs on RFRA compliance (as well as the additional billions in PFCs and AIP funds needed to complete Chicago's expansion plan).

The issue of redressability for St. Johannes clearly falls within the reasoning of this Court's decisions in *Franklin v. Massachusetts,* 505 U.S. 788, 803 (1992), and *Utah v. Evans,* 536 U.S. 452, 463-64 (2002). In *Franklin v. Massachusetts* the Court found redressability on the assumption that the non-party (the President) would abide by the decision of the Court and the Secretary of Commerce. In *Utah v. Evans* the Court again assumed that the non-parties would abide by a decision by the Court and the Secretary of Commerce. In both of these cases the Court recognized that it was conceivable that the non-

party might not abide by the decision of the Court or the agency. But the Court found redressability standing in both cases based on a presumption that the non-party would be likely abide by an authoritative decision.

The Court of Appeals itself had previously followed the precedent of *Utah v. Evans* on this point of standing and redressability, in *National Parks v. Manson,* 414 F.3d 1, 6-7 (D.C. Cir 2005). There the Court of Appeals found redressability because the federal agency's decision would likely "influence" the actions of the non-federal actor.

The precedent set by this Court in *Franklin v. Massachusetts* and *Utah v. Evans* defines a rule that is understandable and readily applicable. It is reasonable to presume that the non-party will abide by and accommodate itself to an authoritative decision on important federal law, such as RFRA. Indeed, the likelihood of Chicago complying with an FAA RFRA directive in this case is even more likely here because FAA held the keys to billions of dollars in federally authorized funds Chicago needs to complete its proposed expansion.

Rather than applying this reasonable presumption founded in this Court's precedent, in analyzing whether there was sufficient likelihood of redressability for standing the Court of Appeals concocted a fictional all-or-nothing choice that had no foundation whatsoever in the case – a fictional choice between sparing the cemetery and canceling the entire O'Hare expansion project. The Court of Appeals stated:

> Finally, if we were to vacate the PFC authorization, Chicago could go back to the

> airlines and attempt to renegotiate. As we have already said during one of this case's many predecessors in our court, the necessity of renegotiations with the airlines would "not create 'a significant increase in the likelihood' that the project would be scuttled altogether rather than merely delayed."

App. 4a (emphasis added).

The Court of Appeals rationale fails on several grounds. First, courts have been skeptical of attempts to raise a lack of redressability by assertion that government and officials would evade an adverse decision. As stated in a leading treatise, as a general rule the courts do not receive such arguments warmly:

> Defendants at times seek to exploit the remedial-benefit requirement by arguing that any available remedy can be evaded. Courts do not receive such arguments warmly. Public officials have not been able to defeat standing either by blustering assertion or by more discrete representations that other ways can be found to maintain the challenged result.

Wright & Miller, 13 Fed. Prac. & Proc. Juris. 2d §3531.6 (text preceding fn. 99). *See e.g., Davis v. HUD*, 627 F.2d 942, 944-45 (9th Cir. 1980); *Akins v. FEC*, 101 F.3d 731, 738-39 (D.C. Cir. 1996), vacated on other grounds, 524 U.S. 11 (1998); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1178 (9th Cir. 2000); *Sierra Club v. Franklin County Power of Illinois*, 546 F.3d 918, 927 (7th Cir. 2008).

Second, there is all the more reason for disregarding an expressed intention of acting in

spite of an adverse determination where the speculative evasion offered is not supported by sound reasoning or the record. *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795, 811-12 (D.C. Cir. 1983). Such is the case here. The Court of Appeals positing of a choice between injury to religion, versus the project being "scuttled altogether," was an unrealistic scenario, with no foundation in the case.

Third, the uncontested record in this case itself demonstrates that the "all-or-nothing" choice which the Court of Appeals posited for its redressability analysis was totally implausible. Chicago's original proposal called for the destruction of two religious cemeteries: St. Johannes Cemetery and Rest Haven Cemetery. FAA decided under RFRA that the Rest Haven Cemetery should be spared in its ALP decision. App. 20a-21a. Chicago complied with FAA's RFRA direction sparing Rest Haven.

Ignoring this obvious precedent for accommodation of religious exercise in the O'Hare expansion project itself, the Court of Appeals performed its redressability analysis under a presumption – pulled from thin air – that accommodating Petitioners' religious exercise interests would result in the entire airport development to be "scuttled." In the context of redressability, it is reasonable to assume that Chicago would accept some level of adjustment of its plan, rather than lose more than a billion dollars in funding in this $1.282 billion PFC authorization, let alone the potential for loss of additional billions in future federally authorized aid for the project.

Surely an assessment of predicted redressability, invoked here so as to deny Petitioners their day in court on the merits, should have some grounding in the practical real world choice that Chicago would face, not in a unsupported conjecture. The practical reality is that Chicago would likely adhere to FAA's (and the court's) RFRA directive rather than forego billions in federally authorized funding assistance.[5]

The Court of Appeals' treatment of the standing redressability issue is unguided by any principle, and has drifted in a direction that does not square with this Court's precedent. The matter at issue is an important RFRA religious protection right mandated by Congress. RFRA should not be trivialized by subordinating it to an implausible imaginary scenario, so as to defeat substantive RFRA rights on an erroneous view of standing, prior to review on the merits.

---

[5] Contrary to the Court of Appeals' unquestioning acceptance of Chicago's assurances that Chicago could replace the billions in federally authorized money elsewhere from non-federal sources, Chicago has never issued bonds for airport development where the O'Hare airlines have not agreed in advance to the bond issue. Here the airlines have refused to back new bond indebtedness that would replace billions in federally authorized financing resources (grants and PFCs). In addition, these same airlines also have refused to participate in any further airline backed bonds to fund the billions in non-federal funds projected by Chicago as needed to complete the expansion project. JA-09048; JA-09119; Addendum to Petition for Rehearing, at A-15 to A-23.

II. THE COURT OF APPEALS' DECISION EVISCERATES THE RFRA PROTECTION MANDATED BY CONGRESS.

Congress enacted the Religious Freedom Restoration Act "to protect one of 'the most treasured birthrights of every American' – 'the right to observe one's faith, free from Government interference.'" *Jackson v. District of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (quoting S. Rep. No. 103-111, at 4 (1993)). To promote this fundamental objective, RFRA prohibits the government from taking any action that would "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. §2000bb-1(a). Only one limited exception to this otherwise absolute injunction exists. The government must prove that the proposed action is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(b).

Under the plain terms of the statute, while the person seeking RFRA protection of religious exercise must show the substantial burden, the government has the burden of demonstrating to a reviewing court that the contemplated action falls within the statute's stated exception; *i.e.,* that it is in furtherance of a compelling governmental interest; and the action is the least restrictive means of furthering that compelling governmental interest. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 126 S.Ct. 1211, 1219 (2006).

Here there is no dispute that the contemplated destruction of St. Johannes will substantially burden religious exercise. FAA has always conceded that element of the RFRA claim. App. 3a. RFRA expressly provides for judicial relief in a case of its violation. 42 U.S.C. §2000bb-1(c).

Yet in two related rulings the Court of Appeals has constructed procedural hurdles that effectively eviscerate RFRA protection in all cases where the federal government either exercises permit approval authority or provides federal funding assistance for actions by non-federal parties that injure religion.

The Court of Appeals ruled in *Village of Bensenville v. FAA* that the exercise of federal permitting authority for a project that harms religion does not trigger federal agency RFRA obligations, based on a rationale that a federal permit does not "encourage" or "coerce" the conduct harmful to religion.

Now the Court of Appeals in the decision below has dropped the other shoe and has ruled that no amount of federal funding (even billions of dollars) of the religiously harmful activity can meet the Article III standing requirement, as long as the non-federal party invokes a fiction that it can raise the money anyway from non-federal sources. Taken together, these two decisions virtually eliminate substantive RFRA review of federal involvement, so long as the physical activity that harms religious practice is conducted by non-federal parties.

In stark contrast to this elimination of religious law protection under RFRA are the cases where

environmental laws are enforced when the federal government exercises permitting or funding authority over the actions of non-federal parties that may harm the environment.

Congress surely did not intend that RFRA religious free exercise rights be less important than environmental protection or be trivialized by creation of an insurmountable standing redressability hurdle that is constructed on implausible fictional footings. Indeed, in making this redressability ruling, the Court of Appeals effectively excused itself from its constitutional obligation to make a substantive decision on the merits on a matter expressly committed to it by Congress.

This abdication of judicial duty potentially violates the Constitution, because the Court of Appeals has declined to address a matter which has been expressly assigned to it by Congress. Congress has mandated substantive RFRA protection for federal actions that cause substantial harm to the exercise of religion. Nowhere has the Constitution or the Congress authorized the Judiciary to ignore Congress's mandate. Indeed, the Constitution compels the Judiciary to take jurisdiction over the case. *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821); *Marshall v. Marshall*, 547 U.S. 293, 298 (2006).

III. THE COURT OF APPEALS' DECISION CREATES PRECEDENT FOR EVISCERATION OF ENVIRONMENTAL PROTECTION LAWS ACROSS THE BOARD.

Central to the Court of Appeals ruling that Petitioners lacked standing "redressability" was the

Court's adoption of Chicago's claim that it could obtain a non-federal substitute for the $1.282 billion in PFC funds elsewhere, if the Court enforced RFRA. Putting aside the serious question of whether Chicago could actually obtain the massive shortfall in federally approved funds, the Court of Appeals' jurisdictional ruling is a dangerous precedent for evisceration of enforcement of many important environmental laws in comparable circumstances.

The Court of Appeals ruling has left Petitioners and this Court with a choice between equally unacceptable alternatives. On one hand, the Court can allow a lesser and weaker level of judicial protection for RFRA religious rights while allowing continued recognition of Article III jurisdiction to challenge violation of federal environmental laws by non-federal actors funded with federal money. But such a position would require this Court to conclude that Congress meant to elevate environmental protection above protection of religious rights.

On the other hand, allowing the logical extension of Court of Appeals' precedent here – to judicial challenges to violations of federal environmental laws in federal funding of non-federal actors – would be equally unacceptable. If not reviewed by this Court, the Court of Appeals' unprecedented jurisdictional ruling will have sweeping effects over many other important federal statutes under which federal agencies routinely make funding decisions and are routinely challenged in court over those funding decisions for violations of federal environmental laws.

In particular, a holding that there is no Article III jurisdiction for seeking enforcement of federal statutory requirements involving federal funding – for lack of redressability – will dramatically weaken environmental protection in cases involving federal funding assistance of third party projects such as highways, sewage treatment plant and other state and local projects. Local governments wishing to build federally funded projects that will destroy precious parks, wetlands and historic sites can simply avoid judicial enforcement of federal environmental laws (*e.g.*, section 4(f) of the Department of Transportation Act of 1966; 49 U.S.C. §303(c)) by making the Article III argument that it can obtain alternative funds.

The potential created by the Court of Appeals decision for widespread disregard of federal laws in projects involving federal funding of actions by non-federal parties justifies and requires clarification by this Court.

CONCLUSION

Petitioners, whose sacred religious cemetery will be desecrated and destroyed by the proposed expansion of O'Hare Airport, respectfully request that this Court grant review on whether they have Article III standing to enforce compliance with the protections afforded by the Religious Freedom Protection Act.

Respectfully submitted,

Joseph V. Karaganis*
A. Bruce White
John W. Kalich
Karaganis, White &
Magel Ltd.
414 N. Orleans Street,
Suite 810
Chicago, Illinois 60654
(312) 836-1177

*Counsel of Record Counsel for Petitioners

APPENDIX A

United States Court of Appeals,
District of Columbia Circuit.

ST. JOHN'S UNITED CHURCH OF CHRIST, et al., Petitioners

v.

FEDERAL AVIATION ADMINISTRATION and Robert A. Sturgell, Administrator, Federal Aviation Administration, Respondents

City of Chicago, Intervenor.

No. 07-1362.

Argued Oct. 23, 2008.
Decided Dec. 19, 2008.
Rehearing En Banc Denied Feb. 19, 2009.

Before: GRIFFITH and KAVANAUGH, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

WILLIAMS, Senior Circuit Judge:

This is the latest installment in an ongoing battle between the City of Chicago and the Federal Aviation Administration on the one hand, and various religious and secular communities bordering O'Hare International Airport on the other. In this case, petitioners challenge the FAA's September 4, 2007 Final Agency Decision, which authorizes Chicago to impose Passenger Facility Charges ("PFCs") on passengers using O'Hare, the revenue to be used for airport improvement projects. The religious petitioners claim the FAA violated the Religious Freedom Restoration Act

("RFRA"), 42 U.S.C. § 2000bb-1, arguing that one of the projects-runway construction necessitating a cemetery relocation-would "substantially burden" petitioners' exercise of religion, but would not further "a compelling governmental interest." In addition, all petitioners challenge the FAA's decision as failing to comply with statutory and regulatory requirements for approval of PFCs.

We do not reach the merits of the RFRA claim; the religious petitioners failed to establish Article III standing to raise it. Specifically, petitioners did not show a substantial probability that in the absence of PFCs Chicago would leave the cemetery alone. In other words, we cannot conclude that petitioners' success on the merits would likely lead to redress of their alleged injury.

On the merits of the secular claims, we find that the FAA's authorization of PFCs was neither arbitrary nor capricious. Contrary to petitioners' claim, the FAA's finding of "adequate justification," 49 U.S.C. § 40117(d)(3), for each of the disputed projects was not unreasonable. We therefore dismiss the RFRA claim and reject the remaining claims.

* * *

Construction of one of the runways for which Chicago received PFC authorization requires relocation of the St. Johannes religious cemetery. According to the religious petitioners, the relocation offends a "fundamental precept" of their religious beliefs, namely, "that the remains of their co-religionists in the sacred consecrated ground of St. Johannes must remain undisturbed until Jesus Christ raises up the departed on the Day of

Resurrection." St. John's Br. 21. Neither the FAA nor Chicago questions the bona fides of this belief.

The three prerequisites of standing-injury, causation, and redressability-are quite familiar. See, e.g., *St. John's United Church of Christ v. FAA,* 520 F.3d 460, 462 (D.C.Cir.2008). The religious petitioners' theory for satisfying them rests on the claimed essentiality of the PFCs to fund the runway project and concomitant destruction of the St. Johannes cemetery. Chicago, they say, has no other source of funding. The airlines operating at O'Hare are refusing to approve further General Airport Revenue Bonds ("GARBs"), which allow recourse only against such revenue; and the city has promised that O'Hare's modernization will be "at no cost to local or state taxpayers." St. Johns Br. at 3 & n. 4; 2 Addendum 363, ¶ 31. Accordingly, the PFC authorization will cause petitioners' RFRA injury, and vacating the authorization would thwart Chicago's plans and thus redress the injury.

Even assuming arguendo that the religious petitioners could be found to have shown injury and causation, redressability is exceptionally speculative. First, Chicago's political promise to protect Chicago taxpayers from the cost of the O'Hare improvements is just that-a political promise with no legal force whatsoever.

Second, Chicago convincingly disputes petitioners' assertion that it lacks alternative sources of funds to replace the PFCs. In its brief and during oral argument, Chicago pointed out it "does not need ... airline approval to issue bonds on which principal and interest are payable from

airport revenue collected after the current airline agreements terminate in 2018," i.e., bonds not secured by the existing agreements and the associated revenues. Chicago Br. 41. In fact, it has already issued hundreds of millions of dollars worth of such bonds. See *id.*; Oral Arg. Tr. 35. Presumably it can do so again.

Petitioners do not dispute the point. They argue instead that bonds not secured by airline agreements would put Chicago taxpayers at risk, arguably contrary to Chicago's promise. St. John's Br., 2 Addendum 363, ¶ 31. But putting taxpayers at risk (assuming the hypothetical bonds would do so) is not the same as an unconditional city obligation. Airport revenue may well prove adequate, so that no taxpayer payment will be required. Certainly politicians frequently describe schemes that impose such risks on taxpayers as "free" or "at no cost to the taxpayer."

Finally, if we were to vacate the PFC authorization, Chicago could go back to the airlines and attempt to renegotiate. As we have already said during one of this case's many predecessors in our court, the necessity of renegotiations with the airlines would "not create 'a significant increase in the likelihood' that the project would be scuttled altogether rather than merely delayed." *Village of Bensenville v. FAA,* 457 F.3d 52, 70 (D.C.Cir.2006) (quoting *Utah v. Evans,* 536 U.S. 452, 464, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002)). Accordingly, the religious petitioners have not shown the requisite "substantial probability" that any order of ours could redress their injury. *St. John's,* 520 F.3d at 462.

* * *

All petitioners challenge the PFC authorization as failing to comply with relevant statutory and regulatory requirements. Before getting to the merits, we briefly note that petitioners have standing to challenge the authorization. "Having to pay the passenger facility fee every time an officer or employee enplanes at O'Hare is a legally cognizable injury, directly traceable to the FAA's order authorizing it and redressable by a favorable ruling from us." *Village of Bensenville v. FAA,* 376 F.3d 1114, 1119 (D.C.Cir.2004). As we have just explained how Chicago's alternative sources of revenue defeat redressability of the RFRA claim, one might wonder why they do not have the same effect here. After all, even in the absence of PFCs, passengers in the aggregate will likely pay this same amount through other airport charges-e.g., ones collected via the various concessions at O'Hare. See Oral Arg. Tr. 38. But courts have never required a plaintiff, forced by an agency ruling to pay a specific charge, to show that he or she will in the end escape an equivalent burden (or offsetting reduction in service). To do so would likely end up with the parties searching for-and almost certainly finding-a fee-payer who could show that the alternative would not burden him, or would not burden him as much; this would be true, for example, of an airport patron who used concessions little or not at all. Given the overwhelming probability of there being some such differently positioned fee-payer, the search would uselessly consume litigation resources.

PFCs are non-federal funds that an airport operator can receive for eligible airport-related

projects. They are collected by airlines through ticket charges from their customers. See 14 C.F.R. § 158.3; FAA Br. 5-7. Chicago applied for PFC authorization for four projects related to various improvements at the O'Hare airport. Three projects directly involved runways-the construction of two new ones (including the runway that requires relocation of the St. Johannes cemetery) and an extension of an existing one. In the fourth project, Chicago sought reimbursement for the cost of already-acquired parcels of land surrounding O'Hare. This land was needed for runway construction, overflight protection, Oral Arg. Tr. 31, and other projects related to the building of runways, all intended to improve airport operations and decrease passenger delays. FAA Br. 10-12.

Before the FAA can authorize an airport operator to receive PFC funds, it must find, among other things, that "the application includes adequate justification for each of the specific projects." 49 U.S.C. § 40117(d)(3); see also 14 C.F.R. § 158.15(c) ("An eligible project must be adequately justified to qualify for PFC funding."). FAA Order 5500.1 further spells out the "adequate justification" requirement. In relevant part, the order requires the FAA to "conclude that the sum of aeronautical benefits would not be disproportionately less than project costs." FAA Order 5500.1, ¶ 4-8, 1 Joint Appendix ("J.A.") 205. In making this determination, "there is no requirement for benefit-cost analysis (BCA)." *Id.* But "in the event that a BCA is available on a project, its inclusion in the project application materials should be encouraged." *Id.*

In the FAA's September 4, 2007 decision, it authorized Chicago to collect approximately $1.2 billion of PFCs for the four projects. 14 J.A. 9536. Relying on Chicago's application materials (including a BCA), the FAA found that each project was supported by adequate justification. Petitioners claim, however, that the FAA's decision did not satisfy the requirements set out in Order 5500.1 because the FAA failed to find, in a non-arbitrary fashion, that the benefits of each project were not disproportionately less than project costs.

We review the FAA's compliance with statutory and regulatory requirements under the highly deferential arbitrary and capricious standard. See *Bensenville,* 376 F.3d at 1120. Moreover, when the FAA's determination involves, as here, forecasts of capacity and demand at an airport, even more deference is due. *City of Olmsted Falls, Ohio v. FAA,* 292 F.3d 261, 270 (D.C.Cir.2002).

In approving Chicago's PFC petition, the FAA relied on the available BCA data. The data were not disaggregated for each project, but were grouped in blocks corresponding to stages in the overall O'Hare improvement program.

Using these data, the FAA reached judgments about the justifiability of the four projects contained in Chicago's application. The three runway projects closely correspond to what is labeled "Phase 1 Airfield" (the only difference is that Phase 1 Airfield includes several taxiways and miscellaneous runway-related projects in addition to the three runways, FAA Br. 10 n. 3). In authorizing PFC funds for each of the three runway projects, the FAA noted the benefit-cost ratio of 6.2

for Phase 1 Airfield. 14 J.A. 9453, 9473, 9496. Benefits quantified to produce the ratio were savings in "aircraft, passenger, and cargo delay" and "[i]mproved efficiency of traffic flows." 10 J.A. 6763. It appears that in finding "adequate justification," 14 J.A. 9554, 9559, 9565, the FAA concluded that the three runways would contribute most of the benefits quantified in the 6.2 ratio. The runway projects were thus not disproportionately costly; together with several taxiways, they produced $6.2 of benefits for every dollar of costs.

Petitioners have offered no direct evidence or reason to think the FAA acted arbitrarily or capriciously in reaching this conclusion. And there's no merit to petitioners' argument that the FAA must show an alternate financial plan in the event that PFC revenues are not made available. There's simply no such requirement. To be sure, Order 5500.1 does require a viable alternative funding source plan, but that is only for Airport Improvement Program ("AIP") discretionary projections, not for PFCs. FAA Order 5500.1, ¶ 4-19(6), 1 J.A. 218-19 ("The financial plan for each project should include ... [v]iable alternate funding source plan for AIP discretionary projections."). Petitioners have not shown that in approving Chicago's PFC application for the three runway projects the FAA failed to comply with any of the applicable statutory and regulatory requirements.

The FAA analyzed the land acquisition project somewhat differently. Because the land would be used for runway construction in more than one phase of the overall O'Hare improvement plan, FAA Br. 10 n. 3, the FAA appears to have relied on the benefit-cost ratio for that overall program

(labeled "Total Master Plan"), for which the calculated benefit-cost ratio was 2.02, 14 J.A. 9519.

Arguing against the supposed justifiability of the overall project, petitioners raise what at first glance seems to be a valid argument. They focus on the segments into which the expert consultants organized the BCA data. The following chart, slightly modified from petitioners' presentation, which in turn is derived from data presented by the FAA, breaks the BCA into segments for Phase 1 Airfield, Total Master Plan, and the increment from one to the other:

Project	Present Value of Benefits (billions)	Present Value of Costs (billions)
Phase 1 Airfield	$12.4	$1.9
Total Master Plan	$12.6	$6.2
Incremental Difference, Total Master Plan over Phase 1 Airfield	$ 0.2	$4.3

Obviously the increment from Phase 1 Airfield to Total Master Plan-which we'll call the TMP increment-has a dismal BCA: benefits of $0.2 billion and costs of $4.3 billion. See St. John's Br., 2 Addendum 374. To be sure, this incremental analysis overlooks the benefits *not* quantified in the BCA data. See 10 J.A. 6763 (listing various other benefits-e.g., ability to accommodate larger aircraft, improved passenger comfort, safety improvements, and shortened pedestrian traffic in getting to a desired gate). But the FAA did not rely on these other benefits, and under standard principles we

cannot do so either. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947). Thus, if the land acquisition were justified only by the counted benefits in the TMP increment, it would seem short of further segmentation to be disproportionately costly. To overcome the objection, the FAA must show that a significant portion of the acquisition was necessitated by the first phase of the overall project, Phase 1 Airfield.

Although the FAA did not make our job easy, it appears the agency has done enough though barely so, and only under the highly deferential arbitrary and capricious standard to shift the focus away from the TMP increment. On the one hand, the FAA determined that "[m]ost of the [land] is needed for Phase 1 runways," with only "a small portion," six of the 331 parcels, being justified exclusively by runway projects in the TMP increment. 14 J.A. 9519; see also FAA Br. 38. They are the six parcels south of the railroad in the extreme lower left of the following aerial photo:

FAA Br., Addendum Exhibit 1 (excerpt). On the other hand, according to the exhibit, the bulk of the remaining 325 parcels lie directly to the left (west) of runway 10R/28L, which is part of the TMP increment, and well below (south of) the

BEST AVAILABLE COPY

southernmost Phase 1 Airfield runway (10C/28C). See *id.*; 8 J.A. 5423; 10 J.A. 6755.

As best we can resolve the apparent contradiction in the FAA's presentation, most of the land, in fact, serves multiple purposes. In project justification documents filed with the FAA, Chicago described the intended land use as follows: "(1) development of new airfield and landside facilities, and (2) construction-related areas for construction, spoil storage, parking construction equipment, and providing for construction haul roads." 14 J.A. 9512. This will enable construction of the overall project "in a way that maintains O'Hare in an open and fully functioning mode throughout the entire construction process." *Id.* Thus, when the overall project is finished, most of the land may indeed serve a runway constructed in the TMP increment. But during construction, the land will be used for projects related to Phase 1 Airfield. Because the cost of these parcels appears to be reasonably connected to the construction of Phase 1 Airfield runways, and thus to the benefits they are expected to provide, the FAA reasonably justified the whole land acquisition project by the favorable benefit-cost ratios for the overall program or Phase 1 Airfield-2.02 and 6.2, respectively (perhaps deeming the remaining six parcels de minimis in the grand scheme of 331 parcels). Accordingly, we are not persuaded that the FAA's authorization of PFC funds was either arbitrary or capricious.

Before signing off, we should say a word or two about the Joint Appendix. The parties sent us 15 volumes, totaling 9710 pages. Most pages appear to contain needless repetition-e.g., identical exhibits attached to different applications filed with the

FAA in the course of the case's long history at the agency level. Worse, the parties' briefs cite items without telling us in what volume we might find them. 'Nuff said.

* * *

We dismiss the religious petitioners' RFRA claim for lack of standing and, finding the FAA's decision to be neither arbitrary nor capricious, deny the remainder of the petition.

So ordered.

APPENDIX B

United States Court of Appeals
For The District of Columbia Circuit

ST. JOHN'S UNITED CHURCH OF CHRIST, et al., Petitioners

v.

FEDERAL AVIATION ADMINISTRATION and Lynne A. Osmus, Acting Administrator, Federal Aviation Administration, Respondents

City of Chicago, Intervenor

No. 07-1362

Filed on February 19, 2009

Before: Griffith and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for panel rehearing filed on February 2, 2009, it is

ORDERED that the petition be denied.

Per Curiam

United States Court of Appeals
For The District of Columbia Circuit

ST. JOHN'S UNITED CHURCH OF CHRIST, et al., Petitioners

v.

FEDERAL AVIATION ADMINISTRATION and Lynne A. Osmus, Acting Administrator, Federal Aviation Administration, Respondents

City of Chicago, Intervenor

No. 07-1362

Filed on February 19, 2009

Before: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

APPENDIX C

United States Court of Appeals,
District of Columbia Circuit.

VILLAGE OF BENSENVILLE, et al., Petitioners

v.

FEDERAL AVIATION ADMINISTRATION,
Respondent

City of Chicago, Intervenor for Respondent.

No. 05-1383.

Argued May 5, 2006.
Decided Aug. 4, 2006.
Rehearing En Banc Denied Dec. 15, 2006.

Before: HENDERSON, ROGERS and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROGERS.

Opinion concurring in part and dissenting in part filed by Circuit Judge GRIFFITH.

ROGERS, Circuit Judge.

The principal issue in this appeal is whether the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bbet seq., requires strict scrutiny of a federal agency's approval of an airport layout plan incident to a determination of eligibility for federal funding if the plan, when implemented by a subdivision of a state, may burden religious exercise. Because O'Hare International Airport, by some measures "the busiest airport in the world,"Suburban O'Hare Comm'n v. Dole, 787 F.2d 186, 196 (7th Cir. 1986), has been plagued by

delays in recent years, the City of Chicago plans to expand and reconfigure the airport. The petitioners, two Chicago suburbs, a church, and several individuals, challenge the Federal Aviation Administration's approval of the City's plan on the ground that the approval violates RFRA because the approved runway configuration, which requires the relocation of a church cemetery, is not the least restrictive means of satisfying the government's compelling interest in reducing delays.

We hold that any burden on the exercise of religion caused by the City's airport expansion plan is not fairly attributable to the FAA. The Supreme Court has recognized that even in instances in which the federal government plays some role, constitutional standards do not attach to conduct by third parties in which the federal government merely acquiesces. So too, a federal agency's determination that a City's expansion plan is eligible for federal funding does not render the City's implementation of the plan tantamount to federal action that is the source of the burden on the free exercise of religion. The expansion plan for the airport, which is owned by the City, was prepared and will be implemented by the City, which is prepared to proceed without federal funds if necessary, and RFRA does not apply to burdens imposed by states or their subdivisions. Hence, the court need not reach the question whether the FAA has shown a compelling governmental interest in imposing a burden on the free exercise of religion.

Additionally, the court lacks jurisdiction to consider the petitioners' challenge to the FAA letter expressing a non-binding intention to obligate federal funding for the expansion because the letter

is not a final order. Accordingly, because the petitioners' remaining contentions are without merit, we deny the petitions for review.

I.

A.

The Airport and Airway Improvement Act, 49 U.S.C. §§ 47101*et seq.* ("AAIA"), authorizes federal funding for airport improvement projects and establishes the prerequisites for a project to be eligible for funding. Congress established a national transportation policy aimed at the efficient transportation of passengers and property to ensure "the expanding wealth of the United States, the competitiveness of the industry of the United States, the standard of living, and the quality of life." *Id.* § 47101(b)(2)49USCAS47101. To those ends, the AAIA requires that "airport construction and improvement projects that increase the capacity of facilities to accommodate passenger and cargo traffic be undertaken to the maximum feasible extent so that safety and efficiency increase and delays decrease." *Id.* § 47101(a)(7).

To establish a "safe, efficient, and integrated system of public-use airports," the Secretary of Transportation must maintain a public airport development plan that includes the "kind and estimated cost of eligible airport development." *Id.* § 47103(a). More pertinently, pursuant to a delegation of authority from the Secretary, *see id.* § 106(g), the FAA may make project grants to a State, public agency, or private owner of a public-use airport from the Airport and Airway Trust Fund for airport development. *See id.* § 47104(a);

see also id. § 47105(a), *id.* § 47102(19). To be eligible for federal grants, the airport development must comply with standards set by the FAA. *See id.* § 47105(b)(3). The FAA may approve an application only if satisfied that there are funds to cover costs not paid by the federal government, that the sponsor has authority to carry out the project, and that the project is consistent with state agency plans for the areas surrounding the airport, will contribute to carrying out the AAIA's purposes, and will be completed without unreasonable delay. *See id.* § 47106(a).

In addition to the statutory requirements for specific projects, a grant application may not be approved unless the airport itself operates according to certain standards. *See id.*§ 47107. Among these standards, the airport owner must "maintain a current layout plan of the airport" that is approved by the FAA. *Id.*§ 47107(a)(16). The FAA must approve any modified airport layout plan ("ALP") before the owner of the airport implements any changes. *See id.*§ 47107(a)(16)(B); id. § 47104. When the approval of such a plan constitutes a "major Federal action[ ] significantly affecting the quality of the human environment" under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 ("NEPA"), the FAA must prepare an environmental impact statement ("EIS") determining the plan's effect on the environment and considering reasonable alternatives. *See id.* § 4332(C); *Communities Against Runway Expansion v. FAA,* 355 F.3d 678, 681 (D.C.Cir.2004); *see also* 49 U.S.C. § 47106(c).

Once an airport owner has an approved ALP, it may apply for a Letter of Intent ("LOI") to provide

AAIA funding for the project. Upon such application, the FAA "may issue a letter of intent to the sponsor stating an intention to obligate from future budget authority an amount." Id.§ 47110(e)(1). Any such statement of intention, however, is non-binding on the federal government. Id.§ 47110(e)(3).

B.

In December 2002, the City, which owns and operates O'Hare, submitted for FAA review an ALP designed to increase capacity and decrease costly delays that were interfering with O'Hare's role as a major connecting hub. The City's plan called for realigning three of the seven existing runways and adding an eighth runway. To accomplish the expansion, the plan would require the City to acquire 440 acres of adjacent property, including businesses and homes in the neighboring Villages of Bensenville and Elk Grove. Further, the plan would require relocation of two cemeteries: St. Johannes and Rest Haven.

Upon receiving the City's application, the FAA prepared an EIS that initially screened fifteen alternatives. After rejecting many of the alternatives as implausible or insufficient means of addressing the delays at O'Hare, and after a second screening eliminated three more, the FAA compared the four remaining alternatives, using computer software to perform simulations that modeled how well each alternative would enhance capacity and reduce delays. The FAA concluded that the City's plan-Alternative C-with the shortest average delay and $150 million savings in the five

years following construction, was clearly preferable to all others.

Members of St. Johannes Church and descendants of those buried at the cemeteries objected that the relocation of the cemeteries would substantially burden their exercise of religion because of their belief in the physical resurrection of the bodies of Christian believers. Citing their rights under RFRA, they asked the FAA to demonstrate that Alternative C was the least restrictive means of meeting the government's compelling interests in reducing delay and enhancing capacity. Although expressing uncertainty over whether it was required to comply with RFRA in this instance because the City was ultimately responsible for designing and implementing the expansion plan, the FAA proceeded as if RFRA did apply in order to avoid litigation over the project. It found that the religious practices of some petitioners would be substantially burdened if the cemeteries were acquired and the bodies were relocated by the City. It concluded after examining the petitioners' proposals for avoiding the relocation of the cemeteries, each of which the FAA characterized as derivative of the no-build and limited build alternatives it had already considered and rejected, and examining derivatives of its own that would limit effects on the cemeteries, each of which the FAA determined posed significant difficulties that would interfere with the goal of reducing delays that Rest Haven Cemetery could remain at its current location by repositioning certain cargo facilities.

Therefore, in the final EIS, the FAA proposed to conclude that Alternative C, as modified to protect Rest Haven Cemetery, was the least restrictive means of achieving the federal government's compelling interest in increasing capacity and reducing delay. After receiving additional comments, the FAA reviewed the conclusions of the EIS in the Record of Decision ("ROD") and concluded that the approval of Alternative C as modified satisfied RFRA because "it clearly performs so much better than any other alternative." The issuance of the ROD on September 30, 2005 cleared the way for the City to implement its plan without relocating Rest Haven Cemetery. Additionally, in response to the City's February 15, 2005 request for a LOI for $300 million of Airport Improvement Program ("AIP") funds and $55.8 million of entitlement funds to go toward the first construction the City would be doing to implement the ALP, the FAA, upon making statutory findings, on November 21, 2005 issued a LOI expressing its intention to fund about $300 million in discretionary funds and $37.2 million in entitlement funds over a 15-year period. These petitions for review followed.

II.

The petitioners' central challenge to the FAA's approval of the City's ALP depends upon RFRA. In 1990, the Supreme Court held in *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), that the Free Exercise Clause of the First Amendment to the Constitution does not prohibit burdens on the exercise of religion imposed by neutral laws of general applicability. *See id.* at 879, 110 S.Ct. 1595. In so doing, the

Court declined to apply the compelling interest balancing test set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963), which required that governments demonstrate that laws substantially burdening religious exercise are supported by a compelling interest. *See Smith,* 494 U.S. at 882-85, 110 S.Ct. 1595. Congress, seeking to secure a wider berth for religious exercise, enacted RFRA, which aimed to reinstate the compelling interest test in place of the neutrality standard pronounced by the Court. *See* Religious Freedom Restoration Act of 1993, Pub.L. No. 103-141, 107 Stat. 1488 (1993) (prior to 2000 amendment); *see also* S. REP. NO. 103-111, at 8 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1897-98; H.R. Rep. 103-88 (1993). In *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), the Supreme Court held that RFRA was unconstitutional as applied to the states because it was beyond Congress's remedial power to regulate states under Section 5 of the Fourteenth Amendment to the Constitution. *See id.* at 536, 117 S.Ct. 2157. RFRA's compelling interest test remained in effect as to the federal government.[1]

---

[1] In response to *City of Boerne,* Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), *see* Pub.L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. § 2000cc *et seq.*), which again applies the compelling interest standard to action by the states, but only as to the limited categories of regulations affecting land use or institutionalized persons. Congress grounded RLIUPA in its Commerce Clause and Spending Clause authority. *See* 42 U.S.C. §§ 2000cc(a)(2)(A)-(B), 2000cc-1(b)(1)-(2). Some of its applications have been upheld against constitutional challenge. *See Cutter v. Wilkinson,* 544 U.S. 709, 125 S.Ct.

RFRA provides that "Government shall not substantially burden a person's exercise of religion,"42 U.S.C. § 2000bb-1(a), unless application of the burden "is the least restrictive means of furthering [a] compelling governmental interest," *id.* § 2000bb-1(b)(2). "Government" is defined as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." *Id.*§ 2000bb-2(1). The petitioners maintain that the relocation of St. Johannes Cemetery would substantially burden the religious exercise of some of the petitioners by interfering with a sacred site of worship and with the physical resurrection of those buried there. In approving a new O'Hare ALP that would require the cemetery's relocation as eligible for federal funding, the FAA violated RFRA, petitioners contend, because the FAA did not demonstrate that Alternative C (even as modified) is the least restrictive means of furthering the governmental interest in increasing capacity and reducing delay.

2113, 161 L.Ed.2d 1020 (2005). In RLIUPA, Congress also amended RFRA to remove references to state and local governments while preserving the law's application to the federal government. *See* 114 Stat. at 806; *see also Cutter,* 544 U.S. at 715 n. 2, 125 S.Ct. 2113. A RLIUPA claim against the City for its plan to acquire St. Johannes Cemetery was dismissed by the District Court for the Northern District of Illinois and is now pending before the Seventh Circuit Court of Appeals. *See St. John's United Church of Christ v. City of Chicago,* 401 F.Supp.2d 887 (N.D.Ill.2005); *St. John's United Church of Christ v. City of Chicago,* No. 05-4418, 2005 WL 3749817 (7th Cir. filed Dec. 30, 2005).

As the FAA is undeniably an "agency ... of the United States," *id.*§ 2000bb-2(1), it is prohibited from substantially burdening a person's exercise of religion except when it can meet the compelling interest test. Whether that prohibition is implicated, however, depends on whether the FAA's approval of the City's ALP is properly characterized as the source of what the petitioners contend is a substantial burden placed on the free exercise of religion.[2] The City, as intervenor, in addition to objecting that its plan does not burden petitioners under First Amendment precedent, contends that the relocation of the cemetery does not implicate RFRA because the City, not the FAA, is responsible for the imposition of the claimed burden on religious exercise. Although "[i]ntervenors may only argue issues that have been raised by the principal parties," and the petitioners object that the City's contention that RFRA is not implicated by the FAA's action is not properly before this court, the court retains "discretion [to] entertain arguments raised only by an intervenor on review if they have been 'fully litigated in the agency proceedings and [are] potentially determinative of the outcome of judicial review.' " *Nat'l Ass'n of Regulatory Util. Comm'rs v. ICC,* 41 F.3d 721, 729-30 (D.C.Cir.1994) (quoting *Synovus Fin. Corp. v. Bd. of Governors of*

---

[2] The City maintains that there is no burden on petitioners under relevant First Amendment precedent. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 450, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). We need not decide that question, but will assume for purposes of our analysis that the relocation of St. Johannes Cemetery imposes a substantial burden.

the Fed. Reserve Sys., 952 F.2d 426, 433 (D.C.Cir.1991)). The court is particularly solicitous of intervenors' arguments in cases in which the intervenor's success before the agency forecloses it from petitioning for review and the issue raised logically precedes the issues in dispute between the principal parties. *See id.* at 730. The City, and the issue it raises, satisfy those criteria. The court, therefore, will consider the FAA's responsibility for the burden on religious exercise.

To determine whether the burden on religious exercise can be properly attributed to the FAA, the petitioners suggest that the court look to the fact that the FAA's role in approving the ALP constitutes a "major Federal action[ ]" for purposes of NEPA. 42 U.S.C. § 4332(C); *see*40 C.F.R. § 1508.18(b)(4). From this perspective, because the FAA must answer for the effects of its decision on the environment, it must also answer for the effects on religious exercise. NEPA broadly applies to all "projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. § 1508.18(a). "Major Federal action" is defined to "includ[e] actions with effects that may be major and which are potentially subject to Federal control and responsibility," "includ[ing] the circumstance where the responsible officials fail to act." *Id.* § 1508.18. Applying NEPA's sweeping definitions would undoubtedly subject the FAA's approval of the City's ALP and its intention to provide partial funding for the O'Hare expansion to the strictures of RFRA.

This approach has some facial appeal. In aviation, as in many fields, the federal government plays a significant role. *Cf. Northwest Airlines, Inc.*

v. Minnesota, 322 U.S. 292, 303, 64 S.Ct. 950, 88 L.Ed. 1283 (1944). The Illinois legislature noted as much when endorsing the O'Hare expansion plan in "recogniz[ing] that ... the planning, construction, and use of the O'Hare Modernization Program will be subject to intensive regulatory scrutiny by the United States and that no purpose would be served by duplicative or redundant regulation of the safety and impacts of the airport or the O'Hare Modernization Program." 620 ILL. COMP. STAT. 65/5(a)(8) (2003). Given the FAA's authority to guide airport development nationwide, one might be tempted to use NEPA to hold the FAA accountable for nearly every aspect of development at the airports that it regulates. But the Supreme Court has instructed that "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Metro. Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 774 n. 7, 103 S.Ct. 1556, 75 L.Ed.2d 534 (1983). Under that analysis, it becomes clear that NEPA's broad application is ill-suited to RFRA's statutory regime.

Although RFRA speaks broadly of "government," with RFRA Congress intended to "restore" the standard by which federal government actions burdening religion were to be judged, *see*42 U.S.C. § 2000bb(b)(1); *City of Boerne,* 521 U.S. at 532, 117 S.Ct. 2157, not to expand the class of actions to which the standard would be applied, *see Hall v. Am. Nat. Red Cross,* 86 F.3d 919, 921 (9th Cir.1996) (quoting S. REP. NO. 103-111, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1901). The Senate Judiciary Committee reported that "the

purpose of [RFRA] is only to overturn the Supreme Court's decision in *Smith,*" not to "unsettle other areas of the law." S. REP. NO. 103-111, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1902. RFRA was not meant to "expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith.*" *Id.* To the extent RFRA was designed to restore a legal standard rather than to extend the compelling interest test to the far reaches of government activities, importing NEPA's applicability into RFRA would give the statute far greater breadth than Congress ever intended. *See Hall,* 86 F.3d at 921. Moreover, to do so would fundamentally recast federal-state relations in a manner that Congress has yet to indicate that it intended.

RFRA was enacted to reestablish a constitutional test with the expectation that courts would look to constitutional precedent for guidance. *See* S. REP. NO. 103-111, at 8, *as reprinted in* 1993 U.S.C.C.A.N. at 1898. The petitioners can point to no indication of a contrary expectation and we have found none. Given that background, it is not surprising then that the proper inquiry is one classically reserved for constitutional jurisprudence. Whether the federal government can be characterized as responsible for the relocation of St. Johannes Cemetery under RFRA requires the same analysis normally necessary to determine whether the FAA could be held responsible for an alleged infringement of constitutional rights. *Cf. Rendell-Baker v. Kohn,* 457 U.S. 830, 838, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). Modified to

apply to this inquiry, the question the court must decide is whether "there is a sufficiently close nexus between the [federal government] and the challenged action of [the City] so that the action of the latter may be fairly treated as that of the [federal government] itself." *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)). "The purpose of this requirement," the Supreme Court explains, "is to assure that constitutional standards are invoked only when it can be said that the State [here, the FAA] is *responsible* for the specific conduct of which the plaintiff complains." *Id.* Similarly, by conducting a state action inquiry here, the court can assure that RFRA's heightened standard is only applied when it can be said that the federal government is responsible for the burden on religious exercise. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-35 (9th Cir.1999); *see also Hall*, 86 F.3d at 921-22.[3]

---

[3] Our dissenting colleague, although agreeing the court must look to pre-*Smith* Free Exercise Clause cases in determining RFRA's bounds, misreads those cases, stretching them beyond reason to eliminate virtually any limit on RFRA's application. Relying primarily on pre-*Smith* cases barring "indirect" burdens on free exercise, *see* Dissenting Op. at 75, the dissent fails to acknowledge that the word "indirect" in those cases referred to the nature of the burden imposed on religious exercise, not to the identity of the entity imposing the burden. In *Sherbert*, the Supreme Court held that the government's denial of benefits to an individual because of conduct demanded by her religious beliefs constituted a burden despite the fact that the burden was only "an indirect result" as "no criminal sanctions directly compel[led]" her to violate her religious beliefs. 374 U.S. at

This case presents an unusual state action question because the regulated party is a separate sovereign rather than a private entity. Despite the rarity of this situation (inasmuch as federal and state governments are generally bound by the same constitutional standards), the analysis proceeds with the same "necessarily fact-bound inquiry," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), as if the federal government were regulating the decision of a private entity, with the City standing in the place

---

403, 83 S.Ct. 1790. "[T]he fact that no direct restraint or punishment [was] imposed," *id.* at 404 n. 5, 83 S.Ct. 1790, was immaterial because "the pressure upon her to forego [her religious] practice [was] unmistakable," *id.* at 404, 83 S.Ct. 1790. This view of what constitutes an "indirect" burden was confirmed in *Thomas v. Review Bd. of the Indiana Employment Security Division,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), in which the Court explained, "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, ... thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id.* at 717-18, 101 S.Ct. 1425; *accord Hobbie v. Unemployment Appeals Comm'n of Fla.,* 480 U.S. 136, 141, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987). These cases tell us that before *Smith* the government was not free to burden religious exercise through less direct restraints than criminal sanctions or fines. They tell us nothing about the constitutional values in play when such a restraint is imposed by a third party who is, in turn, regulated by the government. In the cited cases, there were only two actors: the government and the individual protesting a burden on religious liberty. Therefore, pre-*Smith* free exercise cases do not support creative exploitation of the ambiguity of the word "indirect" to make the government responsible for a burden imposed by another that the government does not lift.

of a private party. *See, e.g., Kitchens v. Bowen,* 825 F.2d 1337 (9th Cir.1987), *cert. denied,*485 U.S. 934, 108 S.Ct. 1109, 99 L.Ed.2d 270 (1988).[4]

The Supreme Court has held that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the

---

[4] Our colleague's conclusion that the state action doctrine is not useful in cases where the government is directly sued, *see* Dissenting Op. at 73-74, is undermined by the Supreme Court's use of the state action inquiry not only to determine whether a third party's actions should be held to government standards, *see, e.g., Moose Lodge v. Irvis,* 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), but also to determine whether the government, when challenged directly, should be held responsible for the actions of a third party, *see, e.g., Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961); *Public Utils. Comm'n v. Pollak,* 343 U.S. 451, 461-63, 72 S.Ct. 813, 96 L.Ed. 1068 (1952); *see also Kitchens v. Bowen,* 825 F.2d 1337 (9th Cir.1987). The dissent provides no alternative limiting principle, concluding only that "indirect" burdens on religious exercise are sufficient, *see* Dissenting Op. at 74, and that "approval" of a third party's actions constitutes an indirect burden, *see id.* at 75-76. In a system of pervasive licensing and regulation by the federal government, our colleague's unbounded approach would mean that as individuals whose religious exercise was burdened by private parties grasped for a federal decision somewhere in the vicinity they could deem to be the "indirect" cause of the burden, every federal licensee would become the state for purposes of RFRA, as the government through its inaction granted "approval" to their decisions. The specter of endless application of strict scrutiny to private actions will not be illusory if those potential plaintiffs are as willing as the dissent to label government involvement as "extensive[ ]," *id.* at 73, or "intense[ ]," *id.* at 76-77, even when the private party invents, designs, advocates, and implements the action that imposes the burden on free exercise.

State." *Jackson,* 419 U.S. at 350, 95 S.Ct. 449. Furthermore, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum,* 457 U.S. at 1004, 102 S.Ct. 2777. "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives ...." *Id.* at 1004-05, 102 S.Ct. 2777; *see also Am. Mfrs. Mutual Ins. Co. v. Sullivan,* 526 U.S. 40, 52, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Moose Lodge v. Irvis,* 407 U.S. 163, 177, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). The receipt of public funds, even of "virtually all" of an entity's funding, is not sufficient to fairly attribute the entity's actions to the government. *See Rendell-Baker,* 457 U.S. at 840-41, 102 S.Ct. 2764 (citing *Blum,* 457 U.S. at 1011, 102 S.Ct. 2777).

In analyzing whether the alleged burden on religious exercise is fairly attributable to the FAA, we "begin[ ] by identifying 'the specific conduct of which the plaintiff complains.' " *Am. Mfrs. Mut. Ins. Co.,* 526 U.S. at 51, 119 S.Ct. 977 (quoting *Blum,* 457 U.S. at 1004, 102 S.Ct. 2777). The specific conduct that the petitioners challenge is the seizure and relocation of St. Johannes Cemetery. Consequently, the court must decide whether the FAA's role in the potential disinterment at St. Johannes is "[m]ere approval of or acquiescence in" the City's plan or whether the FAA "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be

that of the [FAA]."*Blum,* 457 U.S. at 1004, 102 S.Ct. 2777. Fairly characterizing the level of federal governmental involvement can be accomplished "[o]nly by sifting facts and weighing circumstances." *Moose Lodge,* 407 U.S. at 172, 92 S.Ct. 1965. "[A]bsent government coercion or significant government encouragement of the measure under inspection," *Lunceford v. Dist. of Columbia Bd. of Educ.,* 745 F.2d 1577, 1581 (D.C.Cir.1984), the Supreme Court has held that the federal government may not be held responsible for a measure taken by a private actor.

In *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190 (D.C.Cir.1991), this court quoted an EIS that described the FAA's role in airport development:

> In the present system of federalism, the FAA does not determine where to build and develop civilian airports, as an owner/operator. Rather, the FAA facilitates airport development by providing Federal financial assistance, and reviews and approves or disapproves revisions to Airport Layout Plans at Federally funded airports. *Id.* at 197.

That quotation accurately depicts the FAA's involvement here, where it reported that "[t]he FAA did not design the [ALP], nor can it compel the City to implement some or all of it." If the owner or operator proposing to modify an airport's layout wants to qualify for federal funding, certain requirements must be met. Under the AAIA, ALPs must "be in a form the [FAA] prescribes,"49 U.S.C. § 47107(a)(16)(A), and the airport's operator may

"not make or allow any alteration in the airport or any of its facilities if the alteration does not comply with the plan the [FAA] approves," *id.* § 47107(a)(16)(C); *see also Communities Against Runway Expansion,* 355 F.3d at 681. Therefore, if the City wishes to receive any federal funding, it cannot relocate the cemetery without the approval of the FAA.

But the FAA's peripheral role in the City's relocation of St. Johannes is not sufficient to hold the agency responsible for purposes of RFRA. Even under NEPA, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect." *Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 767, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004). The City-not the FAA-is the cause of any burden on religious exercise because of its role as inventor, organizer, patron, and builder of the O'Hare expansion. The City designed the ALP with its attendant impact on the cemeteries. The City submitted the plan to the FAA to retain O'Hare's eligibility for federal funding. Before the FAA, the City fought for approval of its plan. The City will provide the lion's share of the funding for the modernization project; the federal government will cover only twelve percent of the cost of Phase I. The City intends to provide all of the funding through other sources if the federal funds are not forthcoming. And at the end of the day, the City will carry out the seizure and physical relocation of St. Johannes Cemetery.

Our dissenting colleague would find that the FAA did more than merely approve the ALP because of its thorough consideration of alternatives pursuant to NEPA. *See* Dissenting Op.

at 76-77. It is true that the FAA was careful in reviewing the harms to the environment and the benefits to the flying public of approving the City's plan. But the measured approach the FAA took in approving the City's ALP does not make the City's plan an action of the federal government. The Supreme Court has never held that the government becomes responsible for the actions of a third party due to the length or intensity of its attention to the actions of the party before approval. Now that the FAA has approved the ALP, the FAA has no authority to demand that the City build the projects described therein. Earlier in the process, there is no indication that the FAA "exercised coercive power" or "provided ... significant encouragement," *Blum*, 457 U.S. at 1004, 102 S.Ct. 2777, that provoked the City to choose a plan that would harm the cemetery. Indeed, the only significant modification to the ALP encouraged by the FAA was the rescue of Rest Haven Cemetery spurred by the FAA's assumption that it was bound by RFRA. Had this course of events played out differently, with the FAA ordering the change responsible for the burden or playing some greater role in the design of the ALP, perhaps there might be a valid claim under RFRA. But that level of responsibility is not present here.[5]

---

[5] In focusing on the fact that RFRA extends without limit because it "applies to all federal law, and the implementation of that law,"42 U.S.C. § 2000bb-3(a), and that the FAA's approval of the City's ALP as eligible for federal funding was "implementation of" a federal statute, the AAIA, the dissent begs the question whether the FAA's approval can be fairly characterized as responsible for the burden designed and imposed by the City. At no point does the dissent grapple with

To the contrary, the FAA's role as regulator is similar to that in many cases where the Supreme Court has declined to find state action. *See, e.g., Rendell-Baker,* 457 U.S. at 841-42, 102 S.Ct. 2764. For instance, in *Moose Lodge,* 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627, the Court held that a state's issuance of a liquor license to a private club was insufficient to attribute the club's refusal to serve an African-American to the state. *See id.* at 176-77, 92 S.Ct. 1965. And in *Jackson v. Metropolitan Edison Company,* the Court held that the state's utilities commission was not sufficiently connected with a privately owned utility's decision to terminate electric service to apply constitutional standards. *See Jackson,* 419 U.S. at 358-59, 95 S.Ct. 449. The Supreme Court observed that "governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body," and that approval "where the

---

the question "whether government has placed a substantial burden on the observations of a central religious belief or practice," *Hernandez v. CIR,* 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), or whether some other actor should bear the blame for that burden. Rather than "try[ing] to plot a line between state action subject to ... scrutiny and private conduct (however exceptional) that is not," *Brentwood Academy v. Tenn. Secondary School Athletic Ass'n,* 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001), the dissent has eviscerated that line *in toto.* Fortunately, the Supreme Court has applied the state action inquiry in a number of contexts, noting that "examples may be the best teachers," *id.* at 296, 121 S.Ct. 924, providing this court with guidance with which to address this question.

commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into 'state action.' " *Id.* at 357, 95 S.Ct. 449. "At the most," the Court labeled the commission's action a "failure to overturn this practice" that gave the utility the freedom to decide whether to employ it. *Id.* Similarly, despite the FAA's broad regulatory power to approve ALPs as an incident to determining a development project's eligibility for federal funding, the City's "exercise of the choice allowed by [the FAA] where the [challenged] initiative comes from [the City] and not from the [FAA] does not make its action in doing so 'state action.' " *Id.* (citation omitted).

In analyzing cases in which the Supreme Court found no state action in the choices of heavily regulated entities, this court found critical "the interposition of the independent judgment of a private party between the act that allegedly resulted in a constitutional deprivation and the decision of the state to accept that decision and continue funding the private activities." *Kolinske v. Lubbers,* 712 F.2d 471, 480 (D.C.Cir.1983). Here, it was the "conduct of [the City] exercising independent judgment that yielded the contested result." *Id.* Where the FAA "cannot be said to in any way foster or encourage," *Moose Lodge,* 407 U.S. at 176-77, 92 S.Ct. 1965, the burden on religious exercise, "the simple device of characterizing the [FAA]'s inaction as 'authorization' or 'encouragement,' " *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 164-65, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1979), is insufficient to justify

imposition of RFRA's compelling interest test. *See also Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 53-54, 119 S.Ct. 977. The burden imposed on religious exercise by the City's choices with the mere approval or acquiescence of the FAA does not require the FAA to demonstrate a compelling interest. *See Blum*, 457 U.S. at 1004, 102 S.Ct. 2777.

Our dissenting colleague errs in concluding that mere approval is sufficient to hold the government responsible for the actions of a third party. It is plainly incorrect to state that "both the Supreme Court and this [c]ourt held, prior to *Smith*, that a federal agency's approval can be the 'source' of a burden on religious exercise." Dissenting Op. at 75. In the cases cited by the dissent-*Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), and *Wilson v. Block*, 708 F.2d 735 (D.C.Cir.1983)-the courts held that the government action did *not* constitute a burden on religious exercise within the meaning of the First Amendment. *Lyng*, 485 U.S. at 447, 108 S.Ct. 1319; *Wilson*, 708 F.2d at 745. Not even the quoted dicta from those decisions supports the notion that government acquiescence in another actor's decision justifies finding that the government has violated the Constitution. In *Lyng*, the federal government proposed building a road and harvesting timber on federal land where Indians traditionally practiced their religion. *See Lyng*, 485 U.S. at 442-43, 108 S.Ct. 1319. The Supreme Court merely noted "that the Government's proposed actions will have severe adverse effects on the practice of their religion." *Id.* at 447, 108 S.Ct. 1319. The Court never addressed the question that the dissent claims that it did:

whether "approval by a federal agency of third party action can be subject to a free exercise challenge." Dissenting Op. at 76. And the Court had no reason to do so, because the case had nothing to do with "approval by a federal agency of a third party action." *Lyng* never mentions any party besides the government, because 'the Forest Service [would] build a 6-mile paved segment" through the sacred area, *id.* at 442, 108 S.Ct. 1319, and "the Forest Service adopted a management plan allowing for the harvesting of significant amounts of timber," *id.* at 443, 108 S.Ct. 1319. No third party was involved.

Similarly, *Wilson* involved a challenge to a federal governmental decision about what to do with federal land. There, the federal government proposed to allow private interests to develop ski facilities on federal land used for religious practice by several Indian tribes. *See Wilson,* 708 F.2d at 738. This court merely noted that the "construction approved by the [government] ... will cause the plaintiffs spiritual disquiet." *Id.* at 742. *Lyng* and *Wilson* involved the government's use of its own land rather than the government's regulation of a third party's use of the third party's land. Therefore, even if *Lyng* and *Wilson* had dealt with the question of who was responsible for the burden on religious exercise (which they did not), they would not apply here. The Supreme Court "has never held that a [government]'s mere acquiescence in a private action converts that action into that of the [government]." *Flagg Bros.,* 436 U.S. at 164, 98 S.Ct. 1729. We decline our dissenting colleague's invitation to do so today.

That the regulated party here is a government (i.e., a part of a sovereign State,) heightens our hesitancy to apply RFRA's compelling interest test. To do so would subject the City's airport-building plans to "the most demanding test known to constitutional law." *City of Boerne,* 521 U.S. at 534, 117 S.Ct. 2157. In this case, state and local governments would again be hampered by RFRA's "intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.* In *City of Boerne,* the Supreme Court rejected RFRA's "intrusion at every level of government," *id.* at 532, 117 S.Ct. 2157, observing that RFRA would exact substantial costs "both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power," *id.* at 534, 117 S.Ct. 2157. Applying RFRA indirectly, by forcing the FAA rather than the courts to curtail the state's traditional powers, would exact those costs just as surely as applying RFRA directly to the states. Whether Congress might exact those costs through its power to regulate commerce or place conditions on federal spending is a question the court need not decide because Congress has not attempted such a feat. *See O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir.2003). If Congress seeks to alter so dramatically the balance of power between states and the federal government, it must state clearly its intention to do so. *See Vermont Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765, 787, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000); *Gregory v. Ashcroft,* 501 U.S. 452, 460-61, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). Because the relocation of St. Johannes Cemetery cannot be

fairly attributed to the actions of the FAA, the petitioners' RFRA claim fails.

III.

The petitioners also seek vacation of the Letter of Intent expressing the FAA's intention to obligate federal funds to carry out the O'Hare expansion once the City submits grant applications for approval. The petitioners contend the FAA failed to make essential findings mandated by statute.

To begin, the court must determine whether it has jurisdiction to address a challenge to the LOI. *See Citizens for the Abatement of Aircraft Noise v. Metro. Wash. Airports Auth.,* 917 F.2d 48, 53 (D.C.Cir.1990). Section 46110(a) of the AAIA provides that "a person disclosing a substantial interest in an order issued by the Secretary of Transportation ... in whole or in part under ... part B ... may apply for review of the order by filing a petition in [this court]." A LOI is issued under Part B. *See id.*§ 47110(e). The question remains, however, whether a LOI is an "order" at all, much less a final order subject to judicial review.

Few courts have had the opportunity to address what constitutes an "order" under § 46110(a), but many, including this one, *see City of Rochester v. Bond,* 603 F.2d 927, 932-33 (D.C.Cir.1979), have interpreted the statutory section's predecessor, 49 U.S.C. § 1486 (1976). *See Aerosource, Inc. v. Slater,* 142 F.3d 572, 577 (3d Cir.1998) (collecting cases). In doing so, the courts have concluded that an "order" must possess the quintessential feature of agency decisionmaking suitable for judicial review: finality. *See Aerosource,* 142 F.3d at 577-78; *see also City of Rochester,* 603 F.2d at 932-33; *Air Cal.*

v. Dep't of Transp., 654 F.2d 616, 622 (9th Cir.1981). The Supreme Court has explained:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103, 113, 68 S.Ct. 431, 92 L.Ed. 568 (1948)-it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62, 71, 91 S.Ct. 203, 27 L.Ed.2d 203 (1970).

Bennett v. Spear, 520 U.S. 154, 177-178, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). Therefore, the outcome of this inquiry depends upon the place of the LOI in the FAA's decisionmaking process and upon its precise legal effect.

A LOI is an odd creature of statute that, unlike other more definitive agency decisions, merely "stat[es] an intention to obligate from future budget authority an amount." 49 U.S.C. § 47110(e)(1). "A letter of intent ... is not an obligation of the Government ... and the letter is not deemed to be an administrative commitment for financing." *Id.* § 47110 (e)(3). Instead, a LOI is a planning document that "establish[es] a schedule under which the [FAA] will reimburse the sponsor for the Government's share of allowable project costs, as

amounts become available." *Id.* § 47110(e) (1). It does not complete the agency's decisionmaking process, as the City is required to file a further grant application for approval before the FAA will be obligated to disburse the funds described in the LOI. *See id.* § 47105. Thus, not only is the funding decision contingent on congressional appropriation, it also will require further administrative process. It follows that the LOI is non-final because it "does not itself adversely affect [the petitioners] but only affects [their] rights adversely on the contingency of future administrative action." *DRG Funding Corp. v. Sec'y of Hous. and Urban Dev.,* 76 F.3d 1212, 1214 (D.C.Cir.1996) (quoting *Rochester Tel. Corp. v. United States,* 307 U.S. 125, 130, 59 S.Ct. 754, 83 L.Ed. 1147 (1939)).

Moreover, the LOI is non-final because it does not impose an obligation, deny a right, or otherwise fix some legal relationship. *See Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n,* 324 F.3d 726, 731 (D.C.Cir.2003). The statutory text is clear in this regard. When asked during oral argument what the LOI meant to the City, counsel for the City helpfully responded that it is a planning tool that enables the City to approach financial partners for private funding for the development plan. Although airports and their financiers may rely on LOIs as planning tools, this provides the court with no basis to conclude that the LOI establishes a right or obligation when the statute explicitly denies that the LOI is an "obligation" or a "commitment." *Id.* § 47110(e)(3). "Finality resulting from the practical effect of an ostensibly non-binding agency proclamation is a concept we have recognized in the past," but "if the

practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review." *Nat'l Ass'n of Home Builders v. Norton,* 415 F.3d 8, 15 (D.C.Cir.2005). The LOI has no effect absent two conditions precedent: FAA approval of a further grant application by the City and congressional appropriation of funds. The noncommittal language of § 47110 deprives a LOI of the force necessary to make it a final order that may be judicially reviewed because it has no "direct and appreciable legal consequences." *Bennett,* 520 U.S. at 178, 117 S.Ct. 1154. Therefore, the court is without jurisdiction to review issuance of the LOI under 49 U.S.C. § 46110.

Even were the nature of the commitment evidenced by the LOI such that the court could find that it had jurisdiction, the petitioners' injury is not redressable by a decision vacating the LOI because the O'Hare ALP would go forward without the LOI funds. "The redressability inquiry poses a simple question: 'If plaintiffs secured the relief they sought, would it redress their injury'?" *Wilderness Soc. v. Norton,* 434 F.3d 584, 590 (D.C.Cir.2006) (quoting *Mountain States Legal Found. v. Glickman,* 92 F.3d 1228, 1233 (D.C.Cir.1996)) (alterations omitted). Thus, for purpose of determining the petitioners' standing, the court must decide whether "the practical consequence of [vacating the LOI] would amount to a significant increase in the likelihood that [the petitioners] would obtain relief that directly redresses the injury suffered." *Utah v. Evans,* 536 U.S. 452, 464, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002). Or in concrete terms, would the City develop O'Hare as

planned without the $337 million in federal funding set forth in the LOI?

The petitioners maintain that the LOI funding is vital because although the major airlines at O'Hare have agreed to the Phase I business plan, the airlines' final approval is contingent on the City receiving $300 million in AIP discretionary funds. Indeed, the FAA's Inspector General reported, "If the AIP funds are not granted, the City will have to renegotiate approval of Phase 1 with the airlines." That same report makes clear, however, that "[i]f any shortfalls in funding or increases in project costs materialize, the City has indicated it plans to make up the funding/cost difference by issuing additional bonds." The FAA maintains that vacating the LOI would not affect the City's ability to complete the project because practically, the LOI funds only represent a tenth of the funding of the Phase I Airfield, and legally, nothing would preclude the City from buying the property and asking for a federal reimbursement grant later. *See*49 U.S.C. § 47110(c)(1); Respondent's Br. at 72. Even if the City were permanently deprived of federal funds, it could issue more revenue bonds, which would increase its costs by a relatively insignificant margin. Based on a number of studies of the project's financial feasibility, the FAA has determined that removing the LOI funds would not imperil the project. The City agrees, stating that other traditional sources of airport financing are sufficient to fund the project even if the LOI funds are withdrawn.

Although the City's agreement with the major airlines at O'Hare might require further negotiations were the LOI vacated, renegotiations

with the airlines do not create "a significant increase in the likelihood," *Utah v. Evans,* 536 U.S. at 464, 122 S.Ct. 2191, that the project would be scuttled altogether rather than merely delayed. The relatively minor role of the LOI dollars in funding Phase 1 of the O'Hare expansion, the fact that the City could return to the FAA for a grant in a new application, and the existence of alternative sources of funding means that vacating the LOI is unlikely to redress the petitioners' injury. Therefore, because the petitioners do not satisfy the redressability requirement of Article III standing, the court cannot reach the merits of their challenge to the LOI.

IV.

Finally, the petitioners present a variety of administrative law challenges to the FAA's decisionmaking process. They contend that the FAA (1) used stale and unreliable data in a manner arbitrary, capricious, and contrary to law under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and NEPA, and (2) violated the Due Process Clause of the Fifth Amendment by denying them fair decisionmaking procedures. Neither contention has merit.

A.

"A party seeking to have a court declare an agency action to be arbitrary and capricious carries 'a heavy burden indeed.' " *Wisconsin Valley Improvement v. FERC,* 236 F.3d 738, 745 (D.C.Cir.2001)(quoting *Transmission Access Policy Study Group v. FERC,* 225 F.3d 667, 714 (D.C.Cir.2000)). It must show that the agency has

failed to consider relevant factors, *see Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), has made a clear error in judgment, *see id.,* or has failed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,' "*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (quoting *Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 9 L.Ed.2d 207 (1962)).

The petitioners contend that the FAA erred in using an unreasonably short period of evaluation to gauge delay savings benefits by ending its evaluation in 2018, just five years after the project's planned completion. They maintain that a five-year time horizon is at odds with FAA Order 1050.1E, which states that the FAA "usually select[s]" a timeframe lasting until "5 to 10 years after implementation." Needless to say, a "build out plus five year" timeframe is consistent with an order recommending timeframes "5 to 10 years after implementation." But the petitioners also contend quite reasonably that a longer timeframe is desirable for a project of this size and note that longer time horizons have been used to assess other airport development projects. They fail to note, however, that the O'Hare modernization plan will take many years to complete, naturally pushing any useful timeframe far into the future. As it will take eleven years to complete the O'Hare project, the FAA's projection extends sixteen years into the future. The FAA determined that predictions any further along would be of questionable reliability,

which would defy the FAA's NEPA obligation to determine "reasonably foreseeable" impacts. 40 C.F.R. §§ 1508.25(c); 1508.8. The petitioners present no grounds on which the court could question that judgment. The timeframe used was in keeping with FAA precedent and reasonable under the circumstances.

The petitioners also contend that the FAA should have used the 2003 rather than the 2002 Terminal Area Forecast ("TAF") in its computer modeling. Using the more recent forecast, according to the petitioners, would have demonstrated that the ALP was ineffective in preventing delays from returning to O'Hare. The 2002 forecast was the most recent available at the time the FAA began its work. In the ROD, the FAA provided three reasons for relying on the 2002 TAF: its belief in the accuracy of the representation provided by the 2002 forecast, the administrative necessity of cutting off new data at some point, and its ability to take account of the 2003 and 2004 TAF projections by other means. The record demonstrates that the FAA conducted analyses to determine how significantly variations in the 2003 and 2004 TAFs would affect its modeling and that it determined the variations would not affect its conclusions. However desirable it may be for agencies to use the most current and comprehensive data available when making decisions, the FAA has expressed its professional judgment that the later data would not alter its conclusions in the EIS or the approval of Alternative C, and it is reasonably concerned that an unyielding avalanche of information might overwhelm an agency's ability to reach a final decision. *Cf. W. Coal Traffic League v. ICC*, 735

F.2d 1408, 1411 (D.C.Cir.1984). The method that the FAA chose, creating its models with the best information available when it began its analysis and then checking the assumptions of those models as new information became available, was a reasonable means of balancing those competing considerations, particularly given the many months required to conduct full modeling with new data.

Similarly, there is no merit to the petitioners' claims that the FAA improperly relied on other outdated information. The petitioners contend that the FAA used outdated airport operating procedures to construct its base case, rendering its comparison of alternatives invalid. But as the FAA explains, these operational procedures remain in place. The FAA's assumptions regarding airline behavior in response to the restrictions are typical of the predictive judgments to which courts defer and the petitioners fail to show that they were not reasonable. *See Public Utils. Comm'n of Cal. v. FERC,* 24 F.3d 275, 281 (D.C.Cir.1994). The petitioners also contend that the FAA should have altered its baseline forecast to account for delay improvements caused by the FAA's 2004 scheduling order limiting the number of flights at O'Hare. The FAA reasonably explains that it did not use those numbers in the base case because they did not appear until after the FAA began its analysis and because it would be inappropriate to choose as the baseline a set of conditions only achieved by imposing limits that Congress has deemed to be detrimental to the public interest. *See*49 U.S.C. § 47101(a)(9). Again, these judgments regarding the development of the baseline against which alternatives would be assessed are the sorts

of expert analytical judgments to which courts typically defer. *See Public Citizen, Inc. v. FAA,* 988 F.2d 186, 196-97 (D.C.Cir.1993). The petitioners have not provided any ground to doubt the reasonableness of those judgments in this instance.

The petitioners further contend that the FAA established an unprecedented acceptable delay level of fifteen minutes that made Alternative C appear better than it is at reducing delays. To begin, the petitioners fail to point out where the FAA determines that fifteen minute delays are acceptable. Perhaps the petitioners are referring to the fact that, in comparing the "No Action" alternative to other alternatives, the "No Action" alternative was constrained so as to produce between fifteen and eighteen minutes of delay. The FAA explained that such constraints were necessary to generate comparative operational and environmental impacts. The petitioners present nothing to call this judgment into doubt, and given the deference accorded the FAA in forecasting air transportation demand and capacity, *see City of Olmsted Falls v. FAA,* 292 F.3d 261, 272 (D.C.Cir.2002), the court concludes that the FAA was neither arbitrary nor capricious in establishing this baseline.

This litany of arbitrary and capricious challenges is thoroughly rebutted by the FAA, which appears to have acted with great care in conducting its analyses for the EIS and ROD. Without more from the petitioners, the court has no basis to conclude that the FAA's methods were less than rational.

B.

Invoking the Fifth Amendment's Due Process Clause, the petitioners assert that the FAA denied it a right to a fair hearing in several ways: by creating financial incentives that drive FAA employees and officials to approve runway projects, by employing individuals who formerly worked for the City or its consultants, and by withholding thousands of documents that would help them establish this procedural misconduct. Like the FAA, the court has difficulty responding to these assertions because they are vague and conclusory, and the petitioners' failure to provide any greater detail in their reply brief suggests the weakness of these claims. Clearly, "administrative decisions made by adjudicators with a pecuniary interest in the results of the proceeding may suffer reversal," *Jonal Corp. v. District of Columbia,* 533 F.2d 1192, 1197 (D.C.Cir.1976) (citing *Gibson v. Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973), and *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)), but what the petitioners describe appears to be a fairly standard performance-based compensation system and the FAA has advised that its bonuses are not directly linked to individual performance or runway approvals. *See* Respondent's Br. at 61-62. As to the claim that some FAA employees formerly worked for the City or its consultants, the petitioners do not identify a single employee who might have such a conflict of interest from prior employment, so the court cannot determine whether their role in FAA decisionmaking was central enough to question the integrity of the process. Both of these claims of employee bias "fall[ ] far short of demonstrating

that the [FAA] had 'a fixed opinion-a closed mind on the merits of the case.' " *Pharaon v. Bd. of Governors of Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C.Cir.1998) (quoting *Throckmorton v. NTSB*, 963 F.2d 441, 445 (D.C.Cir.1992)) (internal quotation marks omitted). Regardless, "[c]laims of bias must 'be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist,' "*id.*(quoting *Marcus v. Dir., Office of Workers' Comp. Programs*, 548 F.2d 1044, 1051 (D.C.Cir.1976)), and it does not appear that petitioners raised these claims before the agency, thus waiving them here. Finally, as to the petitioners' assertion that the FAA has withheld thousands of documents, they point to nothing in the record to justify this claim. In addition, the voluminous administrative record, much of which includes specific responses to points raised by the petitioners, their lawyers, and their consultants, belies the claim that they have been denied "a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129 (1938).

Accordingly, we deny the petitions for review.

GRIFFITH, Circuit Judge, concurring in part and dissenting in part.

Although the Federal Aviation Administration ("FAA") has conceded that the plan it screened, studied, chose, modified, and approved would substantially burden petitioners' religious exercise, the majority nevertheless concludes that the FAA's involvement in the relocation of St. Johannes Cemetery is "peripheral" and "not sufficient to hold

the agency responsible for purposes of RFRA [the Religious Freedom Restoration Act]." Maj. Op at 64-65. The majority reaches this result after an extensive analysis of cases addressing when a party may be treated as a state actor. The majority presses these "state action" cases into service to determine that a federal agency need not consider an individual's free exercise rights under RFRA even though it is extensively involved in a state or local project. *See* Maj. Op. at 62-63 (citing *Sutton v. Providence St. Joseph Med. Ctr.,* 192 F.3d 826, 834-35 (9th Cir.1999) and *Hall v. Am. Nat'l Red Cross,* 86 F.3d 919, 921 (9th Cir.1996)).

RFRA, however, requires an altogether different analysis. By its plain terms, RFRA mandates that we use the free exercise jurisprudence decided before *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), to determine whether the FAA's actions burden religious exercise. *See*42 U.S.C. § 2000bb(a)(4)-(5), (b)(1).[1] These cases establish that free exercise

---

[1] Section 2000bb of Title 42, U.S.Code, provides:

(a) Findings. The Congress finds that-

* * * * * *

(4) in *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

rights may be violated where the federal government directly-*or indirectly*-burdens religious exercise. Although the majority's approach may have some value where a petitioner attempts to bring a non-federal entity within reach of RFRA-as was the case in *Sutton,* where an employee brought a RFRA claim against a private hospital, and *Hall,* where an employee brought a RFRA claim against the Red Cross-petitioners here have not brought suit against the City of Chicago or any other non-federal entity. Petitioners do not claim that the City of Chicago is "subject to suit under" RFRA because its "alleged infringement of federal rights [is] fairly attributable to the [FAA],"*Sutton,* 192 F.3d at 835, or that the City of Chicago should be "considered [a] government actor[ ] under the First Amendment" because it has "a sufficient structural or functional nexus to the [FAA],"*Hall,* 86 F.3d at 921. Rather, petitioners challenge actual and concrete action by the FAA. *See* Pet.'s Br. at 9 ("This case involves challenges to two separate and distinct FAA decisions.")....

RFRA's substantial reach encompasses both the FAA, *see* 42 U.S.C. § 2000bb-2(1) (RFRA applies to an "agency ... of the United States"), and its required involvement with the Airport Layout Plan under the Airport and Airway Improvement Act,

---

(b) Purposes. The purposes of this chapter are-

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened .

see id.§ 2000bb-3(a) (RFRA "applies to all federal law, and the implementation of that law, whether statutory or otherwise"). Execution of this plan requires the relocation of St. Johannes Cemetery, which the FAA concedes will substantially burden petitioners' religious exercise. Despite the FAA's concession, the majority contends that the FAA is not the "source" of that substantial burden. *See* Maj. Op. at 61.

Where the party being challenged is the federal government and the action at issue is the implementation of federal law, RFRA itself tells us how to determine if the federal government has burdened religious exercise: "the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972)." 42 U.S.C. § 2000bb(b)(1). As the majority acknowledges, we must turn to pre-*Smith* free exercise cases to apply RFRA. *See* Maj. Op. at 61-62 ("RFRA was not meant to 'expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence under the compelling governmental interest test prior to *Smith*.' ") (quoting S.Rep. No. 103-111, at 12, *as reprinted in* 1993 U.S.C.C.A.N. at 1901). This is the very approach taken by our Court and other courts. *See, e.g., Henderson v. Kennedy,* 253 F.3d 12, 17 (D.C.Cir.2001) ("[t]o our court, 'substantial burden' in RFRA is what the Supreme Court had in mind in its pre-*Smith* opinion in [*Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378, 110 S.Ct. 688, 107 L.Ed.2d 796 (1990)]"); *Droz v. C.I.R.,* 48 F.3d 1120, 1122 n. 2 (9th Cir.1995) ("[b]ecause

the RFRA restored the test used to consider free exercise challenges before *Smith,* we rely on pre-*Smith* decisions under the Free Exercise Clause").

I am aware of no decision by the Supreme Court or this Court that has declined to apply a free exercise analysis to a government actor extensively involved in the restraint of religious exercise. Indeed, in *Sherbert,* the landmark case that created the compelling interest test RFRA requires us to follow here, the Supreme Court held even indirect burdens by government can implicate the Free Exercise Clause:

> We turn first to the question whether the disqualification for benefits imposes *any burden* on the free exercise of appellant's religion. We think it is clear that it does.... For 'if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only *indirect.*' *Id.* at 403-404, 83 S.Ct. 1790 (quoting *Braunfeld v. Brown,* 366 U.S. 599, 607, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961)) (emphasis added; footnote and alteration omitted); *see United Christian Scientists v. First Church of Christ, Scientist,* 829 F.2d 1152, 1166 n. 67 (D.C.Cir.1987) ("Government is permitted, and at times required, to accommodate religious practice when government itself, directly or *indirectly,* places a burden on religious exercise.") (citations omitted and emphasis added). As the majority concedes, *Sherbert* and the pre-*Smith* cases "tell us that ... the government was not free to burden religious exercise through less direct restraints than criminal sanctions or fines." Maj. Op. at 63 n.3.

Indeed, both the Supreme Court and this Court held, prior to *Smith,* that a federal agency's approval can be the "source," *see* Maj. Op. at 61, of a burden on religious exercise. In *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), the Supreme Court applied the Free Exercise Clause to the U.S. Forest Service's authorization of third party commercial logging and road projects in areas allegedly sacred to a Native American tribe. *Id.* at 451, 108 S.Ct. 1319. The Court did not hesitate to find that the Forest Service's approval of commercial logging caused harm to plaintiffs' religious exercise, *id.* at 447, 451, 108 S.Ct. 1319. The Court stated that "the *Government's proposed action* will have severe effect on the practice of [plaintiffs'] religion," *id.* at 447, 108 S.Ct. 1319 (emphasis added). The Court found, however, that this burden did not trigger strict scrutiny because it neither coerced plaintiffs into violating their religious beliefs nor penalized them for their religious exercise, *id.* at 449, 108 S.Ct. 1319.

In *Wilson v. Block,* 708 F.2d 735 (D.C.Cir.1983), *cert. denied,*464 U.S. 1056, 104 S.Ct. 739, 79 L.Ed.2d 197 (1983), we scrutinized the Forest Service's decision to grant a permit to private interests seeking to expand and develop a ski area. Plaintiffs filed suit and alleged that the proposed development would burden their religious exercise by impairing "their ability to gather sacred objects and conduct ceremonies." *Id.* at 740. We concluded that the Forest Service, in granting a permit for private development, was responsible for the alleged burden on religious exercise. *See id.* at 742 (the "construction approved by the Secretary is,

indeed, inconsistent with the plaintiffs' beliefs, and will cause the plaintiffs spiritual disquiet"). We ultimately found, however, that "such consequences [did] not state a free exercise claim," *id.* at 742, because they were insufficient to trigger strict scrutiny, *id.* at 745.

Because the federal agency action in both *Lyng* and *Wilson* consisted of approval of third party action, the inescapable conclusion is that both the Supreme Court and this Court have found such action to be the "source" of a burden on religious exercise. That is, approval by a federal agency of third party action can be subject to a free exercise challenge.

Thus I cannot accept the majority's premise that the FAA's conduct here does not impose the type of burden on petitioners' religious exercise that RFRA was enacted to address, especially considering that the FAA's actions go beyond the mere approval found sufficient in *Lyng* and *Wilson*. The FAA initially "screened" fifteen alternative development proposals, Resp.'s Br. at 8, eventually selecting four alternatives "for more intensive study," *id.* at 11. The FAA, in its own words, then "conducted extensive public outreach and coordination with other governmental and non-governmental entities," *id.*, and an "intensive, nine-month review" that involved over one-hundred modeling experiments, *id.* at 13. From the four remaining alternatives, one of which did not require the relocation of St. Johannes Cemetery, the FAA, as stated in its brief, "*chose* Alternative C as *its* preferred alternative"-an alternative that required the relocation of not only St. Johannes but also Rest Haven, another nearby cemetery, *id.* at 14-15

(emphasis added). The FAA then "examined" thirteen additional alternative proposals-eight submitted by petitioners and five created by the FAA itself-that would "avoid or minimize the effects" on the cemeteries, *id.* at 15-16. The FAA rejected all of these alternatives and instead, as recited in its brief, "*issued* a proposed resolution that would *modify* Alternative C so that only St. Johannes but not Rest Haven would have to be relocated," *id.* at 17 (emphasis added). Accepting its own modification, the FAA approved this new version of Alternative C in a 492-page Record of Decision. *Id.* at 19. Thus, by its own admission, the FAA screened, studied, chose, modified, and eventually approved the plan to relocate St. Johannes Cemetery. Contrary to the majority's suggestion, the FAA's involvement here can hardly be said to be "mere approval or acquiescence" in another actor's decisions, Maj. Op. at 66.

The FAA's requirement that St. Johannes Cemetery be relocated in order for the project to go forward causes a burden on religious exercise just as surely as the denial of benefits in *Sherbert,* 374 U.S. at 403-404, 83 S.Ct. 1790, the approval of commercial logging in *Lyng,* 485 U.S. at 447, 451, 108 S.Ct. 1319, and the approval of private development in *Wilson,* 708 F.2d at 742. The FAA's extensive involvement in the plan to relocate St. Johannes Cemetery would not have escaped the reach of the Free Exercise Clause before *Smith* and should not escape the reach of RFRA now.

The majority claims that this approach is "unbounded" and would mean that an "individual[ ] whose religious exercise [is] burdened by private parties" would "grasp[ ] for a federal decision

somewhere in the vicinity [she] could deem to be the 'indirect' cause of the burden" and that "every federal licensee would become the state for purposes of RFRA, as the government through its inaction granted 'approval' to their decisions." Maj. Op. at 63-64 n. 4. The "unbounded approach" the majority decries is a straw man of its own making, stuffed and dressed and tied together with hypothetical scenarios that may justifiably raise alarms in other settings, but not here, not on the facts of this case. Here, the federal government was intensely involved in the plan to relocate St. Johannes Cemetery. That involvement was not a mere "federal decision somewhere in the vicinity" nor was it "the government through its inaction grant[ing] 'approval'." The FAA approved a plan that it had screened, studied, chose, and modified·a plan that it concedes substantially burdens petitioners' religious exercise. Such actions, no less than the actions by the Government in pre-*Smith* cases, entitle petitioners to the protection of RFRA and require us to review the FAA's actions through the lens of strict scrutiny.

Under RFRA's strict scrutiny test, the government must demonstrate a "compelling governmental interest," and use the "least restrictive means" of furthering that interest. 42 U.S.C. § 2000bb-1(a), (b). Here, the FAA advances two compelling interests: delay reduction and increased capacity. The FAA claims that its "Preferred Alternative," which requires the relocation of St. Johannes Cemetery, would produce the greatest delay reduction and increased capacity. Petitioners proffered several alternatives that they claim would achieve those same interests

while saving St. Johannes Cemetery. For example, they argued that shifting one runway 350 feet would preserve the cemetery and still achieve the FAA's objectives.

Under the demands of strict scrutiny, when "a plausible, least restrictive alternative is offered ..., it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *United States v. Playboy Entm't Group,* 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). "A governmental body that imposes a 'substantial' burden on a religious practice must demonstrate, and not just assert, that the [decision] at issue is the least restrictive means of achieving a compelling governmental interest." *O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir.2003).

The FAA offered only conclusory responses to petitioners' proposed alternatives. The FAA, however, must "show with ...*particularity* how its admittedly strong interest[s] ... would be adversely affected by" the various alternatives that would spare St. Johannes Cemetery from relocation. *See Yoder,* 406 U.S. at 236, 92 S.Ct. 1526 (emphasis added). Without such a showing, we cannot determine if any of these alternatives are a less restrictive means of satisfying the FAA's compelling interests. Thus, I would remand this case to the FAA to make such a showing.

Today, the majority holds that a federal agency's intense involvement in a plan that substantially burdens religious exercise does not create a burden recognizable under RFRA. I find it difficult to reconcile this outcome with either the

plain language of RFRA or the free exercise jurisprudence that guides its interpretation. In enacting RFRA, Congress intended to reach "*all* cases where free exercise of religion is substantially burdened" by the Federal Government, 42 U.S.C. § 2000bb(b)(1) (emphasis added), with the purpose of "restor[ing] the compelling interest test" established in *Sherbert* and *Yoder, id.* The majority's holding today improperly narrows the reach and frustrates the purpose of RFRA. Accordingly, I respectfully dissent from Part II of the Court's opinion but otherwise concur.

APPENDIX D

United States Court of Appeals,
District of Columbia Circuit.

ST. JOHN'S UNITED CHURCH OF CHRIST, et al.,
Petitioners

v.

FEDERAL AVIATION ADMINISTRATION and
Marion C. Blakely, Administrator, Respondents

City of Chicago, Intervenor for Respondent.

No. 06-1386.

Argued Feb. 11, 2008.
Decided March 21, 2008.

Before: ROGERS, BROWN and GRIFFITH, Circuit Judges.

Opinion for the Court filed by Circuit Judge BROWN.

BROWN, Circuit Judge:

Petitioners seek review of the Federal Aviation Administration's (FAA's) grant of money to the City of Chicago, reimbursing costs of certain work performed as part of the City's expansion of O'Hare International Airport. We dismiss the petition for lack of standing.

I

Chicago plans on acquiring land in nearby Elk Grove Village and the Village of Bensenville for the expansion of O'Hare Airport. Petitioner Bensenville

complains Chicago's acquisition will destroy its parkland and affordable housing while petitioner Elk Grove complains the acquisition will destroy many businesses and deprive it of tax revenue and other economic benefits. In addition, one of the project's runways will require Chicago to "relocate" St. Johannes Cemetery-a disturbance which petitioners St. John's United Church of Christ, Helen Runge, and Shirley Steele claim will substantially burden their religious exercise.

In an earlier case, the petitioners challenged the FAA's approval of the project's airport layout plan (ALP)-an order the FAA calls the "Record of Decision" (ROD)-and the FAA's letter of intent (LOI). *Vill. of Bensenville v. FAA,* 457 F.3d 52 (D.C.Cir.2006). The LOI established a 15-year schedule under which the FAA will reimburse Chicago for the Government's share of project costs, and stated the government's intention to obligate from future budget authority a maximum of $337 million, paid by annual grants of $20 to $29 million. Before issuing the LOI, the FAA considered whether the O'Hare project met the requirements for airport improvement project (AIP) grants. Analysis and Review of City of Chicago's Application for Letter of Intent AGL 06-01, at 8-9 (Nov. 18, 2005), 10 J.A. 5451-52. But "final application" of those requirements would occur when FAA made "a final decision on the award of a specific amount of funding." *Id.*

We dismissed petitioners' challenges to these findings, holding the LOI unreviewable because it was not an "order" under 49 U.S.C. § 46110(a).[1] The LOI was not an order because it was not final. The LOI did not obligate the government to pay the grants; Chicago still had to apply each year, and Congress still had to appropriate the money. *Vill. of Bensenville,* 457 F.3d at 68-69. In any event, petitioners lacked standing because vacating the LOI would not redress their injuries. Chicago could complete the project even without the $337 million-a mere fraction of the costs of the project. *Id.* at 69-70.

Chicago applied for the first annual grant in the middle of 2006. In September 2006, Chicago accepted FAA's offer of $29.3 million to reimburse Chicago for certain work performed on land not affecting the petitioners. The two concluded a standard grant agreement containing various conditions, among which Chicago must "complete all AIP funded projects without undue delays and in accordance with the terms" of the grant and FAA regulations. Terms and Conditions of Accepting Airport Improvement Grants 8 (June 2005), 10 J.A. 5692. About a year later, the FAA authorized Chicago to collect $1.3 billion in passenger facilities charges (PFC's) to help finance

---

[1] We also rejected the petitioners' challenges to certain determinations in the ROD, and their claim that FAA's approval of the ALP violated the Religious Freedom and Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq. Vill. of Bensenville,* 457 F.3d at 65, 70-72.

the O'Hare project. Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals, 72 Fed.Reg. 61,204, 61,205-06 (Oct. 29, 2007).

Petitioners seek review of the single $29.3 million AIP grant. They claim that certain FAA determinations were flawed, and that the FAA violated RFRA.

II

To establish Article III standing, petitioners must show a "substantial probability" they have been injured, the FAA's grant to Chicago caused their injuries, and the court could redress those injuries. *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C.Cir.2002). Because FAA's $29.3 million grant reimburses Chicago for completed work that did not affect the petitioners, how the grant causes their injuries is a mystery. Perhaps realizing this, petitioners try to characterize the order they challenge as "more than $2 billion in federally approved funding assistance." Petr.'s Br. 21. To reach this figure, petitioners add the $337 million LOI and the $1.3 billion in PFC's. They also add federal funding they expect Chicago will seek because of a $400 million cost overrun.

"It's clear," say petitioners, "Chicago cannot construct the [project] ... without massive AIP and PFC financial assistance." *Id.* at 20-21. There is, however, nothing "clear" about this. The LOI is not before the court. Chicago's acceptance of the first of the LOI's fifteen grants, does not authorize review of the fourteen grants the FAA has not yet offered.

Nor is the $1.3 billion in PFC's before the court.[2] Petitioners think otherwise because the determinations FAA made in awarding the AIP grant here are supposedly the same ones FAA makes when authorizing Chicago to collect PFC's. But the determinations are not the same. While a project is eligible for PFC funding when the project is for "airport development or airport planning," as the AIP statute uses those terms, the project need not meet the same standards for approving an AIP grant. *Air Transp. Ass'n of Am. v. FAA,* 169 F.3d 1, 9 (D.C.Cir.1999). Thus, an FAA order stating "AIP and PFC eligibility of projects is identical" does not support the petitioners. *See* Passenger Facility Charge, FAA Order 5500.1, at 51 (Aug. 9, 2001). That phrase simply means a project meeting the definition of "airport development or airport planning" is eligible for PFC funding.

Next, petitioners assert the grant agreement between FAA and Chicago "contains an FAA-imposed clause that compels Chicago to complete the [project] (necessarily destroying St. Johannes ... and parklands, homes and businesses in Bensenville and Elk Grove Village)." Petr.'s Br. 21. Petitioners apparently focus on the following grant condition: Chicago "shall carry out and complete all AIP funded projects without undue delays." But the "[f]ailure to comply with grant conditions" can result only "in

---

[2] And needless to say, FAA funding the petitioners speculate Chicago will seek is not now at issue.

suspension or termination of the grant." Airport Improvement Program Handbook, FAA Order 5100.38C, at 208 (June 28, 2005). FAA cannot "compel" Chicago to complete the O'Hare project. Nor does Chicago need any compelling. Chicago designed the plan for the project; it submitted that plan to the FAA and fought for its approval. *Vill. of Bensenville*, 457 F.3d at 65. Chicago will provide most of the funding and is prepared to obtain funding from other sources if federal money is unavailable. *Id.* So even if the FAA could compel Chicago to complete the project, vacating the grant condition would not redress the petitioners' injuries because Chicago is committed to completing the project anyway.

In addition, the court has already concluded that vacating the $337 million in the LOI would not redress petitioners' injuries because federal money plays a "minor role" and Chicago could replace it with other sources of funding. That conclusion alone seems to sink the petitioners' challenge to the $29.3 million grant. However, petitioners argue that redressability conditions have changed because of a $400 million cost overrun and the majority-in-interest airlines refusing Chicago's request to issue more bonds. Thus, according to petitioners, if the court overturns AIP and PFC funding, Chicago can no longer replace that funding. Petitioners again err by adding the PFC authorization and the LOI to the single AIP grant they challenge here. Moreover, they have not shown a "substantial probability" that Chicago would scrap the O'Hare project if the court vacated the $29.3 million grant.

Petitioners claim they need not demonstrate such "high probability" of redressability because 49 U.S.C. § 46110(a) and RFRA gives them a "procedural right" to protect their interests, which they may assert "without meeting all the normal standards for redressability and immediacy," *Massachusetts v. EPA,* 549 U.S. 497, 127 S.Ct. 1438, 1453, 167 L.Ed.2d 248 (2007) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 573 n. 7, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). However, that rule applies only when a party challenging an agency's procedural failure cannot "establish with any certainty" that the *agency* would reach a different decision. *Lujan,* 504 U.S. at 573 n. 7, 112 S.Ct. 2130; *see also Fla. Audubon Soc'y v. Bentsen,* 94 F.3d 658, 664 (D.C.Cir.1996). But the redressability obstacle the petitioners face is uncertainty over what *Chicago* would do-not the FAA. Thus, the petitioners must satisfy the normal standard for redressability. They have not. "[I]t is entirely conjectural whether the nonagency activity that affects [petitioners] will be altered or affected by the agency activity they seek to" overturn. *Lujan,* 504 U.S. at 571, 112 S.Ct. 2130 (plurality opinion).

III

Petitioners have not shown that the single $29.3 million grant has caused their injuries, or that the court can redress those injuries. We therefore dismiss their petition for lack of standing.

So ordered.

No. 08-1447

Supreme Court, U.S.
FILED
AUG 14 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, LYNNE A. OSMUS, Acting Administrator of the Federal Aviation Administration, and CITY OF CHICAGO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

SEAN H. DONAHUE
Suite 808
2000 L Street, N.W.
Washington, DC 20036
(202) 466-2234

DAVID T. GOLDBERG
8th Floor
99 Hudson Street
New York, NY 10013
(212) 334-8813

MICHAEL G. SCHNEIDERMAN
2500 N. Lakeview Avenue
Suite 3301
Chicago, Illinois 60614
(773) 477-5444

* Counsel of Record

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON *
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
J. MARK POWELL
Assistant Corporation Counsel
30 N. LaSalle Street
Suite 800
Chicago, Illinois 60602
(312) 744-7764

Attorneys for Respondent City of Chicago

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the D.C. Circuit erred in finding that petitioners failed to carry their burden of establishing Article III redressability in this case.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
REASONS FOR DENYING THE WRIT	10
I. THE NARROW AND CASE-SPECIFIC QUESTION PRESENTED DOES NOT WARRANT FURTHER REVIEW.	13
A. Petitioners Complain Only About The Application Of Settled Law To This Case.	13
B. There Is No Conflict Between The Redressability Determination Below And This Court's Decisions.	14
C. Petitioners' Objections To The Decision Below Are Groundless In Any Event.	18
D. Reversal Would Not Enable Petitioners To Prevail.	23
II. THIS CASE PRESENTS NO ISSUE OF SIGNIFICANCE IN OTHER CONTEXTS.	27
CONCLUSION	31
APPENDIX	
Diagram of O'Hare Modernization Program	1a
St. John's United Church of Christ v. FAA, No. 07-1435 (D.C. Cir. July 14, 2008) (per curiam)	2a

TABLE OF AUTHORITIES

CASES	Page
Allen v. Wright, 468 U.S. 737 (1984)	15
American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 42 (1999)	5
ASARCO Inc. v. Kadish, 490 U.S. 605 (1989)	15
Bowen v. Roy, 476 U.S. 693 (1986)	26
Blum v. Yaretsky, 457 U.S. 991 (1982)	5, 24
Carachuri-Rosendo v. Holder, 570 F.3d 263 (5th Cir. 2009)	7
City of Boerne v. Flores, 521 U.S. 507 (1997)	4, 17
City of Chicago v. St. John's Evangelical Church of Addison Township, No. 07 ED 59 (Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois)	7
Franklin v. Massachusetts, 505 U.S. 788 (1992)	10, 16
Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)	5
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	*passim*
Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988)	25-26
Montana v. United States, 440 U.S. 147 (1979)	30, 31
National Parks v. Manson, 414 F.3d 1 (D.C. Cir. 2005)	14
O'Reilly v. U.S. Army Corps of Engineers, 477 F.3d 225 (5th Cir. 2007)	29
Rendell-Baker v. Kohn, 457 U.S. 830 (1982)	5, 24

TABLE OF AUTHORITIES—Continued

	Page
Raines v. Byrd, 521 U.S. 811 (1997)	27
Renne v. Geary, 501 U.S. 312 (1991)	15
Seminole Tribe v. Florida, 517 U.S. 44 (1996)	24
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	15, 18, 27
South Dakota v. Dole, 483 U.S. 203 (1987)	25
St. John's United Church of Christ v. FAA, 520 F.3d 460 (D.C. Cir. 2008)	7, 8, 21
St. John's United Church of Christ v. FAA, No. 07-1435 (D.C. Cir. July 14, 2008) (per curiam)	8-9, 21
St. John's United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008)	2, 3, 25, 26
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1999)	17
Summers v. Earth Island Institute, 129 S. Ct. 1142 (2009)	28
Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987)	29
Thomas v. Review Board, 450 U.S. 707 (1981)	26
Utah v. Evans, 536 U.S. 452 (2002)	*passim*
Village of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006)	*passim*

STATUTES

42 U.S.C. § 2000bb-1(b)	3
42 U.S.C. § 2000bb-2(1)	4, 17
49 U.S.C. § 40117(a)(3)	9
49 U.S.C. § 40117(d)	1

TABLE OF AUTHORITIES—Continued

Page

49 U.S.C. § 40117(m) 9
49 U.S.C. § 47106(c)(1) 4
Pub. L. No. 106-274, § 7(a)(1) 3

OTHER AUTHORITIES

http://ohare.com/rod/ORD_ROD_Final.pdf 3, 4, 19, 20, 26

http://www.bts.gov/programs/airline_information/airline_ontime_tables/2009_05/index.html 6

IN THE

Supreme Court of the United States

No. 08-1447

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, LYNNE A. OSMUS, Acting Administrator of the Federal Aviation Administration, and CITY OF CHICAGO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

STATEMENT

This petition arises from the sixth federal judicial proceeding brought by these same petitioners in four years contesting actions by Chicago and the FAA to modernize O'Hare International Airport. This time petitioners complain about the FAA's administrative determination, under 49 U.S.C. § 40117(d), that Chicago adequately justified collecting passenger facility charges ("PFCs") to help fund airport expansion and modernization. The FAA approved the moderniza-

tion plan itself in September 2005; and the D.C. Circuit, in a different case, upheld that approval against petitioners' Religious Freedom Restoration Act ("RFRA") challenge. In this case, the court of appeals dismissed petitioners' RFRA challenge to the PFC decision, holding that petitioners failed to satisfy the redressability requirement of Article III standing.

Background

1. *O'Hare Modernization.* O'Hare Airport is "not only one of the busiest airports in the world"; it is also "one of the most congested." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 634 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008) ("*St. John's*"). For years, inefficiencies in O'Hare's outmoded airfield design—a triangle of intersecting runways—have limited the rate of takeoffs and landings, especially in bad weather. Travelers who use O'Hare are subject to delays "at least twice as bad as" those at any other major American airport. *Id.* These endemic problems—nearly 500 delayed flights per day in 2003 (at an average of 57 minutes each)—adversely affect the local and state economies; and because more than half of O'Hare's passengers connect to other destinations, these problems radiate across the nation. J.A. 2215.

In 2001, Chicago, which owns and operates ("O'Hare"), announced the O'Hare Modernization Program ("OMP"), a comprehensive plan to address the chronic and worsening capacity and delay problems. See *St. John's*, 502 F.3d at 620. The OMP reconfigures O'Hare's airfield layout to six parallel and two crosswind runways, enabling a constant stream of

landings and takeoffs. *Ibid.*[1] The redesign requires acquisition of 433 acres of land adjacent to O'Hare, including 539 private homes and 197 businesses. FAA Record of Decision ("ROD") 62.[2] Petitioner St. John's United Church of Christ owns St. Johannes, a religious cemetery that lies directly in the path of new Runway 10C/28C and must be relocated. ROD 97. See also App., *infra*, 1a. Chicago's original plan contemplated relocation of a second cemetery, Rest Haven, but it was later accommodated in a cargo area. ROD 96; see also App., *infra*, 1a. After extensive analysis, FAA experts concluded that no alternative design would accommodate St. Johannes without compromising the project. ROD 97-103. Chicago has committed to relocating graves at St. Johannes in accordance with established protocols. See *St. John's*, 502 F.3d at 642; ROD App. B.

The OMP's projected cost is $14.29 billion, which will come from private sources—General Airport Revenue Bond ("GARB") funds, direct private investment, and PFCs assessed on those traveling through O'Hare—as well as federal funds for airport improvement projects ("AIP"). See J.A. 1842, 1843.

2. *The FAA-Approved Layout Plan.* To construct the OMP, Chicago submitted an amended airport layout plan ("ALP") to the FAA in 2002. Petitioners objected that approving Chicago's ALP would violate RFRA, which requires strict scrutiny of federal government actions that "impose substantial burdens on religious exercise." 42 U.S.C. § 2000bb-1(b); see also Pub. L. No. 106-274, § 7(a)(1) (amending defini-

---

[1] Other plan components include new taxiways, terminal facilities, and control towers.

[2] The ROD is available at http://ohare.com/rod/ORD_ROD_Final.pdf

tion of "government" to delete "a State, or a subdivision of a State"), codified as amended at 42 U.S.C. § 2000bb-2(1)). The FAA considered that objection in its comprehensive review of Chicago's submission, which also included review of compliance with air safety, environmental protection laws, and national transportation policies; Chicago's financing plan; and eligibility for federal grants and PFC-collection authority. See 49 U.S.C. § 47106(c)(1); ROD 106-07.

In 2005, the FAA issued a 492-page ROD, which, among other things, approved Chicago's ALP. With respect to St. Johannes, the FAA, after examining multiple alternatives (eight proposed by petitioners and five the agency developed itself), determined none was acceptable, and further concluded Chicago's plan would pass muster even under strict scrutiny. See ROD 97-102.[3]

The D.C. Circuit upheld the ROD against petitioners' RFRA challenge. *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006) ("*Bensenville*"); Pet. App. 15a. The court recognized that this Court had ruled in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA could not be applied to burdens on religious exercise resulting from state and local government action, and that Congress had responded to that decision by amending RFRA to exempt these governments from the statute. Pet. App. 22a-23a & n.1. Thus, RFRA scrutiny would be indicated only if the "'specific conduct'" to which petitioners objected—the

---

[3] The FAA expressed doubt whether RFRA required strict scrutiny of Chicago's plan, noting the agency "did not design the OMP" and could not "compel the City to implement some or all of it," but assumed "without deciding or agreeing" that the statute applied—in the hope that doing so would spare the "vital project * * * the uncertainties of litigation." J.A. 2086, 2087.

"seizure and relocation of St. Johannes Cemetery"—was "fairly attributable" to the federal government. *Id.* at 31a (quoting *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 42, 51 (1999); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).[4]

The court noted that under this Court's decisions, a regulator's approval or "'failure to overturn'" a non-government actor's practice does not "transmute" the conduct into government action. Pet. App. 36a (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974)). Neither does receipt of public funds, "even 'virtually all'" of the entity's funding. *Id.* at 31a (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982); *Blum*, 457 U.S. at 1011). Accordingly, the court held that "the FAA's peripheral role in the City's relocation of St. Johannes is not sufficient to hold the agency responsible for purposes of RFRA," explaining:

> The City—not the FAA—is the cause of any burden on religious exercise because of its role as inventor, organizer, patron, and builder of the O'Hare expansion. The City designed the ALP with its attendant impact on the cemeteries. * * * The City intends to provide all of the funding through other sources if the federal funds are not forthcoming. And at the end of the day, the City will carry out the seizure and physical relocation of St. Johannes Cemetery.

Id. at 33a.

---

[4] The court further observed that triggering RFRA based on administrative approval of state or local government actions would exact the same costs as those that caused this Court to hold RFRA unconstitutional as applied to these governments and would ignore Congress's post-*Boerne* revision of the statute. Pet. App. 39a.

No judge of the D.C. Circuit, not even the dissenter from the panel opinion, called for a vote on petitioners' request for *en banc* rehearing, and petitioners did not seek certiorari. Chicago has since made substantial progress on the OMP. Extended Runway 10L/28R, new Runway 9L/27R, and a new control tower all opened in 2008; more than $500 million has been spent on Runway 10C/28C; and all but 35 properties needed for the OMP have been acquired. Chicago's application for approximately $182 million for design of the completion phase of the OMP was approved in February 2009. Moreover, on-time performance at O'Hare is improving: in the ranking of 31 major airports, O'Hare rose seven places for arrivals and six places for departures for the first five months of 2009, as compared to the same period of 2008. See <http://www.bts.gov/programs/airline_information/airline_ontime_tables/2009_05/index.html>. O'Hare's capacity also increases; according to the FAA's projections, even just the one new north runway accommodates more than 50,000 additional annual operations. J.A. 7690.

Bensenville also dismissed, for lack of finality and Article III standing, a separate petition for review of a 2005 Letter of Intent ("LOI") announcing the FAA's intention to make available $337.2 million in AIP grants over the next 15 years. The court found no redressability because petitioners failed to show that "'the practical consequence of [vacating the LOI] would amount to a significant increase in the likelihood that [the petitioners] would obtain relief that directly redresses the injury suffered.'" Pet. App. 43a (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). Instead, Chicago would "develop O'Hare as planned

without the $337 million in federal funding set forth in the LOI." Id. at 43a-44a.[5]

3. *Petitioners' Challenges to FAA's Federal Funding Decisions.* In two cases after *Bensenville*, petitioners again asked the D.C. Circuit to set aside under RFRA FAA decisions relating to federal funding for the OMP.[6] In those cases, Chicago and FAA argued, among other things, that such claims are foreclosed by settled law, including *Bensenville*, that government funding does not provide a basis to hold the federal government responsible for the conduct of a nonfederal actor and that, with respect to the specific conduct at issue, Chicago, not the FAA, is the cause of any burden on religious exercise. In both cases, the court did not reach these grounds, instead ruling on the threshold argument that petitioners had failed to make the constitutionally mandated showing of standing necessary to subject-matter jurisdiction.

In *St. John's United Church of Christ v. FAA*, 520 F.3d 460 (D.C. Cir. 2008), Pet. App. 62a, which involved a $29.3 million AIP grant, the court dismissed

---

[5] Petitioners characterize *Bensenville*'s unanimous ruling that they lacked Article III standing as "dictum" (Pet. 13), but it is an alternative holding. Later decisions by the same court, addressing other claims by petitioners, recognize it as such. See *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 461-62, 463 (D.C. Cir. 2008); Pet. App. 63a-64a, 67a. In general, "alternative holdings are binding precedent, not dicta." *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 266 (5th Cir. 2009).

[6] Petitioners filed other religion claims against Chicago in state court and in *St. John's* and have asserted religion-based objections to eminent domain in *City of Chicago v. St. John's Evangelical Church of Addison Township*, No. 07 ED 59 (Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois).

the petition for review based on deficiencies of causation and redressability. The court questioned how the challenged agency action, which granted money for OMP "work that did not affect the petitioners," could injure them (Pet. App. 65a), and rejected petitioners' attempt to show causation by a clause in the grant agreement that supposedly "'compel[led] Chicago to complete [the OMP] (necessarily destroying St. Johannes . . .),'" *id.* at 66a (citation omitted). After explaining that the boilerplate grant provision had no such effect, the court continued:

> Nor does Chicago need any compelling. Chicago designed the plan for the project; it submitted that plan to the FAA and fought for its approval. *Vill. of Bensenville*, 457 F.3d at 65. Chicago will provide most of the funding and is prepared to obtain funding from other sources if federal money is unavailable. *Id.* So even if the FAA could compel Chicago to complete the project, vacating the grant condition would not redress the petitioners' injuries because Chicago is committed to completing the project anyway.

Id. at 67a. The primary obstacle to redressability, the court continued, was not uncertainty whether the FAA would reaffirm its funding decision after redoing the RFRA analysis, but "uncertainty over what Chicago would do," because it was "'entirely conjectural whether the nonagency activity that affects [petitioners] will be altered or affected by the agency activity they seek to' overturn." *Id.* at 68a (emphasis in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (plurality opinion)). Petitioners did not seek certiorari.

In *St. John's United Church of Christ v. FAA*, No. 07-1435 (D.C. Cir. July 14, 2008) (per curiam), App.,

infra, 2a, the court dismissed for lack of causation and redressability a petition for review of the second AIP grant, this time for $28.4 million. Petitioners did not seek certiorari.

Proceedings Below

In this case, what is before the Court is the FAA's 2007 approval of Chicago's applications to collect $1.2 billion in PFCs for the OMP. Pet. App. 7a. "PFCs are non-federal funds." *Id.* at 5a. Unlike AIP grants, which come from the Treasury and are appropriated by Congress, PFCs are collected from ticket purchasers by the airlines, which hold them in trust for airport operators (49 U.S.C. § 40117(m)), and spent locally in connection with "specific" airport improvement projects that meet statutory eligibility requirements (*id.* § 40117(a)(3)). The FAA found that Chicago's applications "adequately justified" the assessment of PFCs for four "specific project[s]": three runways and land acquisition "for runway construction, overflight protection, and other projects related to the building of runways." Pet. App. 6a. Projects related to Runway 10C/28C totaled $693.3 million ($346.6 million in bond capital and an equal amount for financing and interest). J.A. 9560. None of the PFC collections would be spent to acquire or relocate the cemetery. J.A. 9547.

The D.C. Circuit dismissed petitioners' RFRA challenge for lack of standing, holding that "petitioners [failed] to show a substantial probability that in the absence of PFCs Chicago would leave the cemetery alone." Pet. App. 2a.[7] After assuming arguendo

[7] The court also denied the petition on the administrative review claims, holding that the FAA's findings of "adequate

that the Church could establish two of the three prerequisites of standing—injury-in-fact and causation—the court found the claimed redressability "exceptionally speculative." *Id.* at 3a. Chicago had "convincingly disputed" petitioners' assertion that, in the event of a ruling in their favor (and a favorable decision by the FAA on remand), the City would "lack[] alternative sources of funds to replace the PFCs." *Id.* Petitioners' requests for rehearing and rehearing *en banc* were denied.

REASONS FOR DENYING THE WRIT

Petitioners challenge the D.C. Circuit's application of a single prong of this Court's test for Article III standing to the facts of this case. The petition does not present any question warranting this Court's review.

1. Petitioners do not claim any conflict between the decision below and any other by a court of appeals about the legal rules governing Article III redressability. Instead, they ask the Court to review the correctness of the court of appeals' application of those settled rules in this case, namely, its finding that petitioners failed to establish a "substantial probability" or "significant increase in the likelihood" that Chicago would abandon its complex, carefully designed, and FAA-approved airport project if the PFC decision were reversed.

2. Petitioners do claim the court below failed to follow *Utah v. Evans*, 536 U.S. 452 (2002), and *Franklin v. Massachusetts*, 505 U.S. 788 (1992), but the opinion is entirely consistent with these cases and actually cited *Evans*. Petitioners misread the

---

justification" were neither arbitrary nor capricious. Pet. App. 7a-11a. Petitioners do not seek review on these issues.

decision below and this Court's redressability jurisprudence in arguing for a presumption that, they contend, the court of appeals failed to apply.

3. In any event, there is no merit to petitioners' claim that the court below erred in applying the law to the facts presented; nor would the result be different if petitioners were able to overcome the lack of redressability. Petitioners' central assignment of error is that the court gave insufficient weight to Chicago's actions with respect to Rest Haven Cemetery. But for numerous obvious reasons, Chicago's willingness, during the ALP-approval process, to modify the cargo area is no basis to infer it would be amenable to a wholesale redesign of the airfield reconfiguration at the heart of its modernization program years after construction has begun.

Petitioners also wrongly claim that the court below should have assessed redressability on the assumption that Chicago would likely alter its ALP if the FAA required a change before providing federal funding or approving user fees. This ignores a very serious question whether the FAA could condition its decisions on Chicago's abandonment of what has already been determined, in a prior review proceeding brought by these same petitioners, to be a lawful airport construction project. It also ignores that petitioners cannot claim injury from any aspect of the ALP except Runway 10C/28C, and that yet another prior review proceeding by these same petitioners has settled that petitioners lack standing to challenge an amount of money similar to the PFCs for the capital costs of that runway.[8] As for funding or PFCs

[8] The FAA approved a total of $693.3 million in PFCs for Runway 10C/28C. This amount included $346.6 million in capital costs and an equal amount authorized for financing

approved in other decisions or not yet approved at all, these also were obviously not within the court's jurisdiction. Because the PFCs actually at issue here are insufficient to alter Chicago's course, they are insufficient to confer standing. In fact, this lack of redressability is not the only Article III defect here. Petitioners also failed to show that the injury they complain of—the relocation of St. Johannes—is fairly attributable to the FAA. That issue was also settled in prior litigation and cannot be challenged here.

Moreover, while petitioners' standing is the Court's first concern, it is almost the least of their problems. Waiting just on the other side of the jurisdictional threshold in this case is a welter of defects dispositive of the merits of petitioners' claims. Had petitioners not been dismissed on standing grounds, they would have confronted circuit precedent—set in a prior case they brought—under which their RFRA challenge to the FAA's approval of PFC authority would necessarily fail. Moreover, this prior decision demonstrates both that petitioners have not been denied substantive consideration of their RFRA claim and that their claim in this case was doomed by preclusion problems of their own making. Thus, even if the decision below had rested on a hotly controverted understanding of redressability, rather than the universally accepted one, this case would still be an inappropriate vehicle for resolving the issue.

4. Petitioners seek to put these earlier decisions to entirely different and improper use, urging that the importance of the Article III decision below should be

---

costs. Because the financing costs would not be incurred if petitioners were successful in overturning the Runway 10C/28C PFCs, the net loss to Chicago is $346.6 million in project funding. The entire LOI was $337 million.

gauged "in context" of the prior decisions, which petitioners contend were erroneous in broadly significant ways. But the D.C. Circuit's RFRA ruling is not before the Court in this case. If that court has adopted an unusually and significantly restrictive construction of the statute (which it has not), this Court can take up the issue in a case in which it is actually and timely presented, which it is not here.

I. THE NARROW AND CASE-SPECIFIC QUESTION PRESENTED DOES NOT WARRANT FURTHER REVIEW.

Notwithstanding petitioners' invocation of "the immediate context of a prior related decision" (Pet. 5), that decision became final without a request for review in this Court. This separate case raises a single question: whether the court of appeals erred in holding that petitioners failed to show the redressability necessary for the court to entertain their claim that the FAA's PFC approval violated RFRA. That question is not certworthy.

A. Petitioners Complain Only About The Application Of Settled Law To This Case.

Petitioners do not dispute that the burden of demonstrating redressability is on the party invoking federal jurisdiction. See *Defenders of Wildlife*, 504 U.S. at 561. Nor do they dispute that under this Court's cases, redressability is lacking unless "the practical consequence" of the decision sought from the court "would amount to a significant increase in the likelihood" of "relief that directly redresses the injury suffered." *Evans*, 536 U.S. at 464; see Pet. App. 4a, 43a. Rather, petitioners ask the Court to overturn the D.C. Circuit's application of this settled

Article III standard to the facts of this case. Petitioners do not claim that the D.C. Circuit had the power in this case to order Chicago to cease or radically alter the complex airport reconfiguration project it began designing and building the better part of a decade ago, and indeed that design has already been upheld. See Pet. App. 19a-40a. All that is before the Court here is the finding that there is no "substantial probability" Chicago would relocate Runway 10C/28C, even if PFCs were withheld because of its current location. Pet. App. 2a. This is no basis for certiorari. This Court generally does not entertain claims of case-specific error, let alone sift through and re-weigh evidence to do so.

B. There Is No Conflict Between The Redressability Determination Below And This Court's Decisions.

Review is also not warranted to settle any "conflict" between the redressability holding and "this Court's precedent." Pet. 21. The only cases petitioners actually cite are *Evans* and *Franklin*, which found redressability in cases involving the federal census, despite the non-party status of officials whose actions would ultimately be required to provide plaintiffs relief. But the claim that the D.C. Circuit has "drifted" away from these cases (*ibid.*) is incorrect. Far from abandoning those decisions and denying standing in cases where plaintiff has shown it is "likely that the non-party actor will modify its behavior" (*id.* at 16), the D.C. Circuit continues to treat *Evans* as controlling, as petitioners elsewhere acknowledge. See *id.* at 18 (observing that the D.C. Circuit applied *Evans* in *National Parks v. Manson*, 414 F.3d 1, 6-7 (D.C. Cir. 2005)). And worse still for their claim, the court below invoked the very test—

whether there is a "'significant increase in the likelihood'" of a favorable response—of the very opinion petitioners hold out as announcing the proper standard. Pet. App. 4a (quoting *Bensenville*, Pet. App. 43a; *Evans*, 536 U.S. at 464).

Beyond that, petitioners misread this Court's precedent to claim a conflict. *Evans* and *Franklin* did not, as petitioners claim, direct federal courts to apply a "presumption" (Pet. 18) that non-party actors will modify their behavior to avoid injury to the plaintiff. Indeed, this Court's cases, both before and after these decisions, employ essentially the opposite rule. "We presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotation marks omitted). Similarly, the Court requires the party seeking to invoke federal jurisdiction to bear the burden with respect to each element of Article III standing (see *Defenders of Wildlife*, 504 U.S. at 561, 567 n.3); and redressability is "substantially more difficult" to show (*Allen v. Wright*, 468 U.S. 737, 758 (1984)) in cases like this one—where "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," and redress "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Defenders of Wildlife*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.) (emphasis in original)). See also *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

Petitioners' contention that *Evans* and *Franklin* required the court below to take as "given" the "strong likelihood that Chicago would comply with any decision by FAA (or by the Court of Appeals) that the Petitioners were entitled to substantive protection under RFRA" (Pet. 5) ignores the fundamental differences between the legal claims—and redressability issues—in those cases and this one. The plurality in *Franklin* found it "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation" of statutory and constitutional provisions that actually govern their actions, even though these officials "would not be directly bound by such a determination." 505 U.S. at 803. Indeed, in finding redressability, the Court expressly noted the conspicuous absence of any indication from the Solicitor General (on behalf of the non-party executive officials) that they would stand on their procedural rights, ignore a declaratory judgment, and insist on an injunctive order. See *Evans*, 536 U.S. at 460; *Franklin*, 505 U.S. at 803 (plurality opinion). Moreover, the plaintiffs in *Evans* and *Franklin* had a "substantive" right under the Census Clause's "actual Enumeration" requirement (U.S. Const. art. I, cl. 2 § 3) to be free from the methods alleged (and found) to be unconstitutional, whether or not the federal officials were technically bound by the judgment.

Here, by contrast, petitioners presented a claim under a statute that does not govern Chicago's actions. This Court itself, in *Boerne*, settled that RFRA cannot constitutionally be applied to state and local governments; and for all petitioners' loose references to RFRA compliance and evasion (*e.g.*, Pet. i, 4, 5, 6, 17, 18, 19, 20, 27), even they do not claim that local government action unintentionally burdening

religious exercise violates that statute. And of course it does not. See *Boerne*, 521 U.S. at 534-36; 42 U.S.C. § 2000bb-2(1). Moreover, as we explain, the court in the prior *Bensenville* decision rejected petitioners' claim that Chicago's plan to relocate St. Johannes is unlawful under RFRA. Petitioners' reliance on the courts' reluctance to allow a defendant to "evade an adverse decision" (Pet. 19) ignores that no interpretation of RFRA can give them any substantive rights against Chicago. Moreover, the D.C. Circuit has repeatedly found that Chicago can and would implement the OMP without either federal funds or PFC approval. Pet. App. 3a-4a, 33a, 67a; App., *infra*, 2a. Chicago's ability and intent to go its own way if necessary makes this case like *Defenders of Wildlife*, not *Evans* and *Franklin*. In *Defenders of Wildlife*, the redressability holding reflected the Solicitor General's position that the regulations at issue were not binding on the non-party funding agencies. See 504 U.S. at 568-70 & n.4.

If anything, *Evans* supports the decision below. While *Evans* ultimately found standing because of likely non-party compliance with a federal court's decision, the Court first considered whether, as one respondent had claimed, the relief petitioners sought was statutorily impermissible. See 536 U.S. at 461-64; see also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107-08 (1999) (request under statute for relief that would redress plaintiff's injuries does not support standing if statute does not provide for relief sought). Here, as we explain more fully below, the D.C. Circuit's settled, authoritative construction of both Article III and RFRA would prohibit the court from awarding the kind of sweeping relief needed before petitioners could make the required showing of redressability.

C. Petitioners' Objections To The Decision Below Are Groundless In Any Event.

The shortcomings petitioners purport to have identified in the D.C. Circuit's application of the redressability test are not errors at all. To begin, the decision did not hold that "no amount of federal funding * * * can meet the Article III standing requirement, as long as the non-federal party invokes a fiction that it can raise the money anyway." Pet. 23. See also *id.* at 6 (claiming the court of appeals evaded RFRA's "substantive protection against religious harm caused by federally funded projects"). This case involves only PFCs, which are non-federal funds.[9] Moreover, the court relied on evidence, not an assertion (see *id.* at 16) or a "fiction" (*id.* at 23) that Chicago can and would pursue the OMP without PFCs. There is nothing remotely unusual about that conception of redressability. See *Defenders of Wildlife*, 504 U.S. at 571 (plurality opinion) ("Respondents have produced nothing to indicate that the projects they have named will * * * be suspended" if federal funding were eliminated); *Simon*, 426 U.S. at 40-41. And besides all that, the RFRA statute on which petitioners rely is not a funding statute in any event.

Petitioners repeatedly insist that the court of appeals would have found redressability here less "exceptionally speculative" (Pet. App 3a) if it had paid more attention to Chicago's "prior conduct [regard-

---

[9] Although the petition uses terms such as "federally authorized financial assistance" (*e.g.*, Pet. 3) and "federally authorized funds" (*e.g.*, *id.* at 6, 18), no doubt intending to blur the distinction between PFCs and federal grants, the D.C. Circuit correctly described PFCs as "non-federal funds." Pet. App. 5a.

ing] * * * Rest Haven Cemetery" (Pet. 17). According to petitioners, because Chicago "had already complied with the FAA's directive to preserve Rest Haven Cemetery," there was "substantial uncontroverted evidence that Chicago would abide by any order entered by FAA relating to RFRA protection of St. Johannes." *Id.* at 15. Petitioners' conception of the FAA's authority is legally erroneous and factually unsupported.

As a legal matter, the FAA is not empowered to issue "directives" aimed at securing "RFRA compliance" (Pet. 17) by local airport operators. Local governments are not required to comply with RFRA. Moreover, RFRA compliance by Chicago has never been petitioners' claim. Weak as it is, the gravamen of the review petition here was that *the FAA* became responsible for the claimed burden on petitioners' religious exercise by approving Chicago's PFC application because some of those user fees would be used to finance work the FAA had approved, and the D.C. Circuit upheld, years earlier in the ROD.

On the facts, the premise that Chicago would respond to an FAA decision refusing to approve PFCs for Runway 10C/28C by providing "identical RFRA protection" to St. Johannes as was provided to Rest Haven (Pet. 11) is fanciful. Rest Haven is in a far less crucial location, and Chicago voluntarily accommodated it by altering the intended placement of a cargo facility and fencing a public road. ROD 96-97. By contrast, St. Johannes sits in the direct path of an integrally important runway. See App., *infra*, 1a. Avoiding relocation would require significant alteration of the airfield; and the FAA found in the ROD that engineering, air safety, and environmental issues precluded any such alteration consistent with

OMP's capacity-enhancement and delay-reduction goals. See ROD 97-103. Moreover, Chicago's readiness to make an accommodation in the earlier circumstance, while vigorously contesting this one, is direct evidence that it does not see the two situations as remotely comparable and therefore cannot be presumed to respond to them the same way. Nor, of course, does the FAA see any comparison. The agency found relocation of St. Johannes so crucial to the ALP that it met even a strict scrutiny standard. See ROD 103.[10] And since then, the D.C. Circuit has settled that strict scrutiny is not even required. See Pet. App. 21a-40a.

Nor do petitioners advance any basis for assuming Chicago's decision on Rest Haven reflects a general policy of accepting whatever the FAA might think necessary for RFRA compliance, rather than simply a judgment that in that instance, the benefits of standing on its rights (and waiting for the judicial vindication that came in *Bensenville*) were outweighed by the costs.[11]

Likewise, there is no merit to petitioners' contention that the court below took an impermissible "all-or-nothing" approach (Pet. 18, 20) to redressability. Seizing upon the opinion's use of the word "scuttled," petitioners spin out a claim that the D.C. Circuit required them to show that Chicago would abandon

---

[10] Petitioners' complaints about computer modeling (Pet. 10 n.2) were fully considered in *Bensenville* (Pet. App. 19a-20a). No further modeling was necessary for the PFC decision authorizing collection of user fees to fund projects approved in the ROD.

[11] Petitioners' contention that the FAA "directed Chicago to modify its plan to preserve Rest Haven" (Pet. 10) is not supported by their citation (Pet. App. 21a).

the entire OMP if the PFC decision were overturned, when it should have "assume[d] that Chicago would accept some level of adjustment of its plan" rather than lose billions in PFCs and future federal funding (*id.* at 20). This assumes that the court below was persuaded petitioners had shown Chicago was substantially likely to alter the location of Runway 10C/28C in the event of a favorable decision, and ruled against them because they failed to make a further showing that Chicago would abandon the entire OMP. This assumption is unfounded. As the opinion makes clear, the court below was keenly aware that petitioners' objections were confined to the "[c]onstruction of one of the runways," namely the one that "requires relocation of the St. Johannes religious cemetery." Pet. App. 2a. Indeed, a prior panel had held that petitioners could not challenge funding for other runways precisely because that "work . . . did not affect the[m]." *Id.* at 65a; see also App., *infra*, 2a. And, far from requiring an extravagant showing of redressability, the court dismissed the petition because petitioners failed to show the constitutionally required "substantial probability" that "Chicago would leave the cemetery alone" if petitioners' challenge were successful. *Id.* at 2a.

In fact, petitioners' real complaint is that the court of appeals did not take a sufficiently "all or nothing" approach—*i.e.*, that it was required to assume that a favorable decision in this case would have induced the FAA to "condition" approval of all the PFCs at stake in this case—indeed all future federal funding of the OMP—on Chicago's "compliance" with RFRA. See Pet. 17 ("FAA could condition the approval of the present $1.282 billion in PFCs on RFRA compliance"); *id.* at 18 ("FAA held the keys to billions of dollars in federally authorized funds"), 20, 21, 23.

But that was no error. As we explain above, the D.C. Circuit had previously settled that petitioners could challenge—and a federal court could set aside—only FAA decisions involving work that "affect[ed] petitioners." Pet. App. 65a. This eliminates three of the four PFC projects at issue here. And petitioners have not explained how future grants or PFCs—not yet even awarded—are both before the court in this case and for work that affects them.

Nor was the D.C. Circuit permitted, let alone required, to presume that the FAA would decide on its own to rescind approval of these other PFC projects, and suspend all future federal funding for O'Hare, until Chicago overhauled the already approved and judicially sustained airfield redesign. On the contrary, the FAA had concluded, in a final decision, that the PFCs applications were "adequate[ly] justif[ied]" (Pet. App. 6a), and petitioners do not explain how the FAA would have authority to rescind that approval. Nor could the FAA lawfully condition future funding decisions on Chicago's alteration of the project to satisfy petitioners' RFRA objections. As the D.C. Circuit held in *Bensenville*, federal funding, including "virtually all of an entity's funding" does not trigger strict RFRA scrutiny, when, as it held here, the "specific conduct" objected to is attributable to the non-federal actor. Pet. App. 31a (internal quotation marks omitted). And, as we also explain above, in addition to the usual prohibition on establishing redressability through speculation, *Evans* and *Steel Co.* make clear that it is impermissible to support such claims by hypothesizing relief that is unavailable as a matter of law.

At bottom, to the extent petitioners' claims have even superficial plausibility, it is because they ignore

what both controlling D.C. Circuit precedent and the plain text of RFRA, as amended, make clear: that the statute simply does not attempt to regulate, directly or indirectly through federal funding decisions, the actions of states and local governments.

D. Reversal Would Not Enable Petitioners To Prevail.

If petitioners had shown redressability, the review petition would have been dismissed for failure to satisfy Article III's causation requirement. The D.C. Circuit had already held (on the merits, as we explain below) that "[t]he City—not the FAA—is the cause of any burden on religious exercise" (Pet. App. 33a), and it had held, in another, separate case, that petitioners' claims of FAA power to "compel" construction were (in addition to untrue) beside the point, because "Chicago [does not] need any compelling. Chicago designed the plan for the project; it submitted that plan to the FAA and fought for its approval." *Id.* at 67a. But even as a matter of first impression, putting these prior binding decisions to the side, petitioners cannot show that the FAA's 2007 approval of Chicago's PFC applications was the cause of Chicago's decision to design the 2001 ALP to relocate St. Johannes.

Causation requires a finding that "[t]he specific conduct" challenged is "fairly attributable" to the defendant. Pet. App. 31a. Thus, in this case, petitioners must show that relocation of St. Johannes was caused by or fairly traceable to the FAA's determination that the City had shown adequate justification to collect funds to implement certain OMP projects. Such a theory stretches well-settled Article III principles (and ordinary English) beyond the breaking point.

And if petitioners could clear the jurisdictional threshold, they would face swift and certain demise on the merits again. Contrary to petitioners' repeated complaint that they have never been afforded substantive review of RFRA compliance (see Pet. 4, 11 & n.3, 24), the D.C. Circuit, in *Bensenville*, rejected their RFRA claim on the merits. As the court explained, under settled law, neither federal "approval of or acquiescence in the initiatives of a [non-federal] party" nor "receipt of public funds, even of 'virtually all' of an entity's funding, is * * * sufficient to fairly attribute the entity's actions to the [federal] government," and thereby trigger RFRA. Pet. App. 31a (quoting *Rendell-Baker*, 457 U.S. at 840-41, and *Blum*, 457 U.S. at 1011).[12] The court also explained that the text and structure of the post-*Boerne* amendments foreclose any claim that Congress intended RFRA to reach cases like this one. See *id.* at 26a-40a. To that can be added the problem that petitioners' attempt to use RFRA to implicitly impose religious-accommodation obligations on state and local governments that receive federal funds

---

[12] Petitioners contend that *Bensenville* "left undecided whether billions of dollars in federally authorized *funding* of a project executed by non-federal actors" was sufficient to "implicate RFRA." Pet. 6. (emphasis in original). That is accurate only in the sense that the prior case did not involve billions of dollars. Nevertheless, the court rejected both federal approval and federal funding as a basis for federal accountability, and that holding is broad enough to cover this case. "[T]he principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (citation omitted). Moreover, this case does not involve billions of dollars either. As we explain, petitioners can claim injury only from the $346.6 million PFCs destined for Runway 10C/28C.

contravenes settled law that conditions on federal spending must be explicit. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); see also Pet. App. 29a, 39a. *Bensenville* was a decision on the merits of petitioners' RFRA claim, namely that they have no such claim because the burden they complain about was caused by Chicago, not the FAA. Having settled that federal approval and federal funding are insufficient to impose federal responsibility for the project, the D.C. Circuit could not plausibly rule differently for federal authorization to collect private funds for a project not fairly attributable to the federal government.

And even this catalogue of problems merely scratches the surface of the reasons petitioners have no hope of prevailing on a RFRA claim, even leaving standing aside. While petitioners boldly proclaim "no dispute that the contemplated destruction of St. Johannes will substantially burden religious exercise" (Pet. 23), that is not remotely undisputed. No court has ever agreed with petitioners, and Chicago has highlighted petitioners' misconception of RFRA at every turn. See Pet. App. 24a n.2 (noting this unresolved issue); *St. John's*, 502 F.3d at 619 n.1 (same). Although we have not questioned the sincerity of petitioners' religious objection to cemetery relocation, it states no burden on the exercise of religion. Petitioners' complaint here is that they hold "a central belief" that "disturbing graves * * * would be a sacrilege." Pet. 9. But there is a difference, as this Court has recognized, between government action that is an affront to religious belief and action that imposes a substantial burden on religious exercise. A burden on beliefs—no matter how sincerely or strongly felt—is not a burden on the exercise of religion. See, *e.g.*, *Lyng v. Northwest Indian Cemetery*

Protective Association, 485 U.S. 439, 452-53 (1988); *Bowen v. Roy*, 476 U.S. 693, 697 n.3, 699 (1986); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). Indeed, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng*, 485 U.S. at 452.

Finally, even in terms of what petitioners seem to mean by "substantive review of their * * * RFRA claim" (Pet. 11 n.3), their claim that the dissenting opinion in *Bensenville* was the only one to reach the merits of strict scrutiny review is simply false. The Seventh Circuit concluded (arguably in dictum) that Chicago's actions would withstand strict scrutiny. See 502 F.3d at 634-36. The FAA itself did as well. ROD 103-04. In fact, the great irony of the FAA's decision is that it applied RFRA in an excess of caution, so that this vital project would not be bogged down in litigation. See J.A. 2087. At a minimum, one would expect litigants relying so heavily on the FAA's determination that cemetery relocation for the ALP imposes a cognizable burden on religion (see Pet. 23) to acknowledge the FAA's further conclusion that the ALP nonetheless satisfies strict scrutiny, because it is the least restrictive means of furthering the compelling interests of capacity-enhancement and delay-reduction. Given that this further conclusion reflects the FAA's particular expertise in reviewing ALPs for their fit with the needs of the national aviation system, as well as engineering and air safety requirements, this omission is all the more troubling. And of course the ROD is final now, and has been for years.

* * * *

In applying this Court's redressability test to the particular case before it, the D.C. Circuit

discharged—and did not "excuse[] itself from"—its "constitutional obligation" (Pet. 24). "'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon*, 426 U.S. at 37). The court below correctly applied those principles, ruling that the possibility petitioners would actually obtain relief in the event of a ruling against the FAA in this case was "exceedingly speculative," rather than highly likely. That decision is correct and does not merit further review. Moreover, in seeking review, petitioners do not address a host of other defects—that they failed to show causation and thus lack standing for this reason as well, and that their RFRA claim fails on the merits because RFRA does not apply to Chicago's plan, and the relocation of the cemetery does not impose a substantial burden on petitioners' exercise of religion.

II. THIS CASE PRESENTS NO ISSUE OF SIGNIFICANCE IN OTHER CONTEXTS.

To counter the (accurate) impression that the petition seeks merely to correct a single case-specific conclusion, petitioners make various claims that the decision below is sweepingly significant, asserting, among other things, that it conflicts with standing law in environmental cases involving federal permitting or funding. See Pet. 24. They also contend that it is a "dangerous new precedent" (*id.* at 7) and that, in combination with *Bensenville*, it has "eviscerated" RFRA (*id.* at 22). But petitioners offer no substantiation for these bold assertions. They do not cite a single environmental case, from any court, that might come out differently as a result of the decision here.

Similarly, if the D.C. Circuit had taken a uniquely restrictive view of Article III standing in RFRA cases, surely it would not be difficult for petitioners to find at least one decision from one of the other twelve courts of appeals that applied a different rule in a RFRA case sometime in the three years since *Bensensville*, if not before. In fact, the D.C. Circuit itself recognized in *Bensenville* that had "events played out differently, with the FAA ordering the change responsible for the burden or playing some greater role in the design of the ALP, perhaps there might be a valid claim under RFRA." Pet. App. 34a. That fact-specific ruling, as well, shows no issue of overarching significance meriting review even in that long-final decision.

Nor do petitioners substantiate their claim that the D.C. Circuit has used different tests for RFRA standing and environmental standing. Federal courts have long required plaintiffs suing under environmental statutes, as under other statutes, to satisfy the three-pronged constitutional test for standing, and have not hesitated to find standing lacking when that test was not satisfied. See *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148-49 (2009); *Defenders of Wildlife*, 504 U.S. at 562.

Beyond that, the decision below could not conflict with ones involving "the federal government['s] exercis[e] of permitting or funding authority" (Pet. 24) for the simple reason that this case does not involve a federal permit or funding. Instead, the FAA approved an application to collect private funds for a project that received all necessary federal permits years ago in a separate FAA decision that the D.C. Circuit upheld in a separate case. Moreover, when petitioners challenged the permitting decision (the

ALP) under RFRA, the D.C. Circuit did not dismiss for lack of standing but it held that the RFRA claim failed on the merits. See Pet. App. 21a-40a. As a result, petitioners' claims that the D.C. Circuit will allow local governments "to avoid judicial enforcement of federal environmental laws altogether by merely claiming that they have alternative sources of funds" (Pet. 8) describes neither this case nor *Bensenville*. Nor does this case present any issue of segmented projects, of the type that may go under the radar of environmental regulation. See, *e.g.*, *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 235-36 (5th Cir. 2007); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-300 (D.C. Cir. 1987). That is because petitioners' concern about "piecemeal payment of the $337 million LOI" (Pet. 14) ignores both that the LOI is not in front of the Court in this case and that the D.C. Circuit considered it in its entirety and still rejected it as a basis for standing because invalidating it would not redress petitioners' claim of injury. Pet. App. 43a-44a; see *id.* at 63a-64a, 67a.

Petitioners should not be allowed to relitigate rulings made in other cases or even use them as "context." Pet. 5. "Context" means that the noteworthy issues were actually decided in other cases. For this reason alone, this case would be a poor candidate for review even if it did raise some generally significant question of federal standing or substantive law (which it does not). This case is laden with preclusion problems because "factual findings * * * essential to the review sought in this case" were made in "separate actions." *Id.* at 11. Perhaps petitioners forwent review of *Bensenville* because they had waived any argument how, under settled state-action cases and this Court's constitutional holding in

Boerne, the court could nonetheless hold the federal government responsible for Chicago's planned cemetery relocation. Or perhaps their litigation choices reveal no belief in the correctness of their position but only an intent to wage a multi-year, multi-jurisdictional litigation campaign against airport expansion. Whatever the reason, petitioners' claim of broad significance for decisions "[t]aken together" (*id.* at 23) is no basis to free them from the usual rules aimed at avoiding "the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). With the prior *Bensenville* litigation having settled that the harm petitioners complain of is not fairly traceable to the FAA, but caused solely by Chicago, there is nothing untoward or out of step, much less dangerous, about a standing ruling that merely confirms petitioners cannot seek redress from the FAA.

These concerns have, if anything, added force in this case, given the Court's reliance in *Boerne*, in holding RFRA unconstitutional against state and local governments, on the costs of not only "curtailing [the States'] traditional general regulatory power" but also "in practical terms of imposing a heavy litigation burden." 521 U.S. at 534. Despite the constitutional infirmity in applying RFRA to Chicago, petitioners have attempted to do essentially that in five successive petitions for review in the D.C. Circuit.

And federalism concerns about the dignitary interests and litigation burdens on state and local governments are only part of what is at stake here. Petitioners have steadfastly ignored that the OMP

relieves significant pressures on the national aviation system and provides relief to millions of travelers, many of whom use O'Hare to fulfill work, family, and their own religious obligations. In exercising its discretionary jurisdiction, this Court need not and should not ignore that at some point litigation must come to an end and there are well-recognized grounds for "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana*, 440 U.S. at 153. Nor should it grant certiorari to allow litigation of issues long since settled between the parties.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SEAN H. DONAHUE
Suite 808
2000 L Street, N.W.
Washington, DC 20036
(202) 466-2234

DAVID T. GOLDBERG
8th Floor
99 Hudson Street
New York, NY 10013
(212) 334-8813

MICHAEL G. SCHNEIDERMAN
2500 N. Lakeview Avenue
Suite 3301
Chicago, Illinois 60614
(773) 477-5444

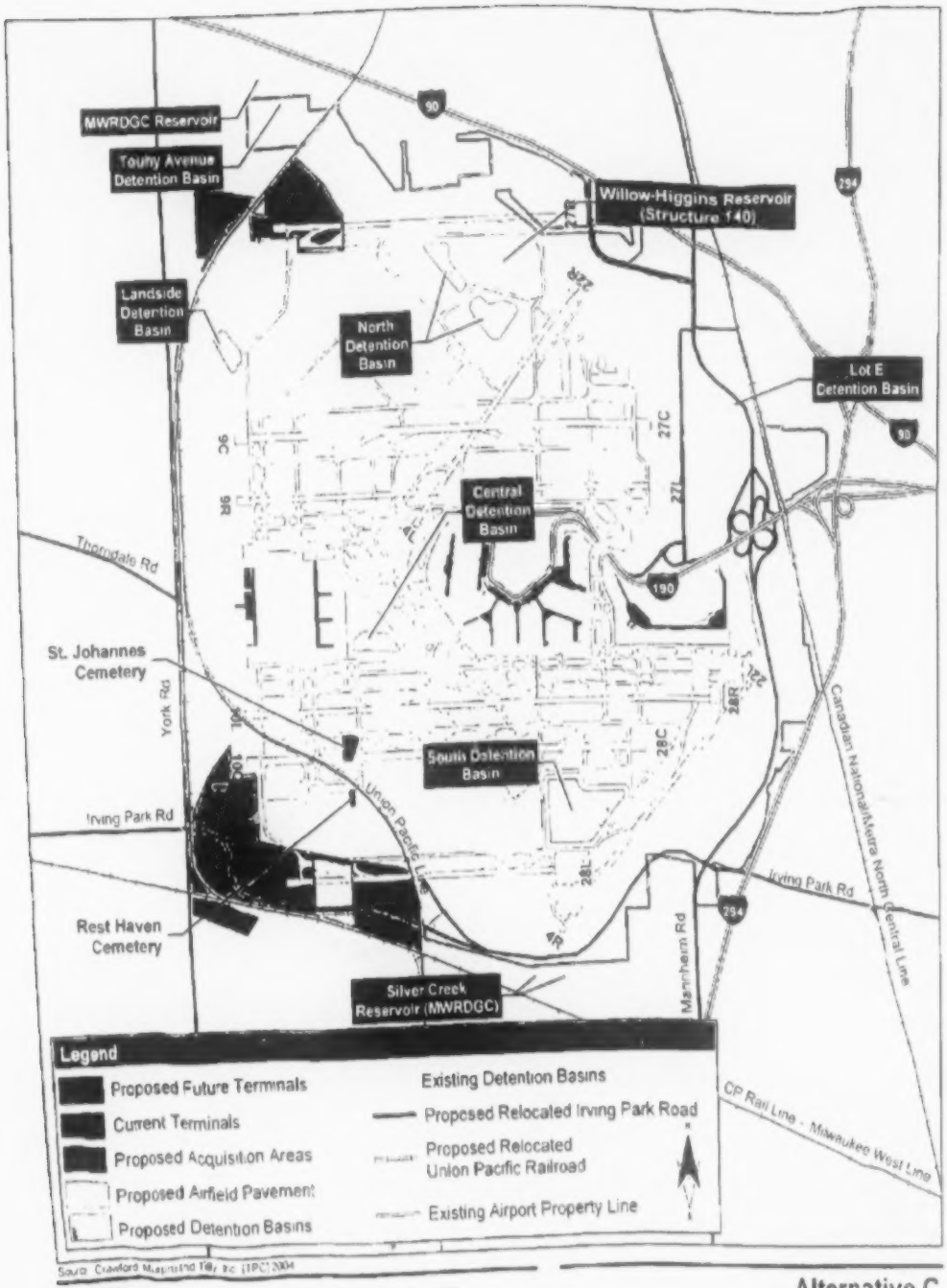
* Counsel of Record

August 14, 2009

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON *
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation
Counsel
J. MARK POWELL
Assistant Corporation
Counsel
30 N. LaSalle Street
Suite 800
Chicago, Illinois 60602
(312) 744-7764

Attorneys for Respondent
City of Chicago

APPENDIX



Source: Crawford Murphy and Tilly, Inc. (IPC) 2004

Chicago O'Hare International Airport

Alternative C

▶ **Exhibit 3-8**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2007
No. 07-1435
FAA-3017-0022-91

Filed On: July 14, 2008

ST. JOHN'S UNITED CHURCH OF CHRIST, *et al.*,
Petitioners

v.

FEDERAL AVIATION ADMINISTRATION AND
ROBERT A. STURGELL, ACTING ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
Respondents

CITY OF CHICAGO,
Intervenor

BEFORE: Ginsburg, Randolph, and Kavanaugh, *Circuit Judges*

ORDER

Upon consideration of the motion to dismiss, the opposition thereto, and the reply; the motion to hold case in abeyance, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Petitioners lack standing, because they have not shown that the single $28.4 million grant is the cause of their injuries, or that those injuries are redressable. Like the previously challenged $29.3 million

grant, the $28.4 million grant "reimburses Chicago for completed work that did not affect the petitioners ...." *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 462 (D.C. Cir. 2008). This court has already determined that "vacating the $337 million in the [FAA's Letter of Intent] would not redress petitioners' injuries because federal money plays a 'minor role' and Chicago could replace it with other sources of funding." *Id.* at 463; *see also Village of Bensenville v. FAA*, 457 F.3d 52, 70 (D.C. Cir. 2006). It is

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term 2007
No. 07-1435

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

Supreme Court, U.S.
FILED
AUG 1 1 2009
OFFICE OF THE CLERK

No. 08-1447

In the Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, ET AL.,
PETITIONERS

v.

RANDY BABBITT, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
JOHN CRUDEN
Acting Assistant Attorney General
M. ALICE THURSTON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The City of Chicago is in the midst of a multi-year, multi-billion-dollar program to modernize O'Hare International Airport. The Federal Aviation Administration (FAA) has authorized the City of Chicago to collect passenger facility charges (PFCs) in order to partially finance the modernization.

Petitioners are a church and two of its members. They object to the modernization project because it will require relocation of a cemetery to accommodate a runway. They contend that the FAA's approval of the collection of certain PFCs violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb-1(b).

The question presented is whether the court of appeals erred in concluding that petitioners lack standing to challenge the FAA's approval of certain PFCs under RFRA.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Blum v. *Yaretsky*, 457 U.S. 991 (1982) 5, 19
City of Boerne v. *Flores*, 521 U.S. 507 (1997) 2, 6, 17
Employment Div. v. *Smith*, 494 U.S. 872 (1990) 2
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 15, 16
Illinois Dep't of Transp. v. *Hinson*, 122 F.3d 370 (7th Cir. 1997) 9, 18
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 12
Rendell-Baker v. *Kohn*, 457 U.S. 830 (1982) 5
St. John's United Church of Christ v. *City of Chi.*:
128 S. Ct. 2431 (2008) 7
502 F.3d 616 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008) 3, 7, 14, 20
401 F. Supp. 2d 887 (N.D. Ill. 2005), aff'd, 502 F.3d 616 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008) 6
Utah v. *Evans*, 536 U.S. 452 (2002) 12, 15, 16, 17

Constitution, statutes and regulations: Page

U.S. Const.:
Art. III 9, 18
Amend. I 7
Free Exercise Clause 2
Amend. XIV (Equal Protection Clause) 7
Illinois Religious Freedom Restoration Act, 775 Ill. Comp. Stat. Ann. 35/1 *et seq.* (West 2001 & Supp. 2009) 7
Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.* 2
42 U.S.C. 2000bb-1(b) 2
42 U.S.C. 2000bb-3(a) 2
Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.* 7
49 U.S.C. 40117(a)(3)(A) 8
49 U.S.C. 40117(b)(1) 8
49 U.S.C. 40117(b)(4) 8
49 U.S.C. 40117(d) 9
49 U.S.C. 40117(i)(2)(A) 8
49 U.S.C. 47107(a)(16) 3
14 C.F.R. 158:
Section 158.3 ..... 8, 18
Section 158.5 ..... 8, 9, 18
Section 158.13 ..... 8, 18
Section 158.41 8

Miscellaneous:

56 Fed. Reg. 24,254 (1991) 8, 18

In the Supreme Court of the United States

No. 08-1447

ST. JOHN'S UNITED CHURCH OF CHRIST, ET AL.,
PETITIONERS

v.

RANDY BABBITT, ADMINISTRATOR, FEDERAL
AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 550 F.3d 1168.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2008. A petition for rehearing was denied on February 19, 2009 (Pet. App. 13a-14a). The petition for a writ of certiorari was filed on May 19, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), this Court held that the Free Exercise Clause of the First Amendment does not require neutral laws of general applicability to be justified by a compelling government interest, even if they substantially burden a religious practice. *Id.* at 882-890. In response, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which provides:

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000bb-1(b).

Although this Court invalidated RFRA as applied to the States and their subdivisions in *City of Boerne* v. *Flores*, 521 U.S. 507, 532-536 (1997), RFRA continues to apply to the federal government, see 42 U.S.C. 2000bb-3(a).

2. This case concerns a challenge to one part of a multi-year, multi-billion-dollar program the City of Chicago has undertaken to modernize O'Hare International Airport (O'Hare). Pet. App. 1a; Pet. 2-3 & n.1. Petitioners are a church that owns a cemetery that will be relocated because of the modernization project and two individual church members who have deceased family members in the cemetery. Pet. App. 2a; Pet. 8-9. Petitioners have long objected to the modernization program and have challenged various aspects of it in court. In this case, petitioners challenge one particular administrative

ruling, which is the Federal Aviation Administration's (FAA's) authorization of the City of Chicago to collect passenger facility charges (PFCs) to fund part of the modernization plan. In petitioners' view, the FAA's decision violates RFRA.

a. O'Hare, which is "by some measures the busiest airport in the world," "has been plagued by delays in recent years." Pet. App. 15a-16a (internal quotation marks omitted). Those delays "spark further delays around the country and the world, with serious economic and logistical consequences." *St. John's United Church of Christ* v. *City of Chi.*, 502 F.3d 616, 634 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008). Moreover, "[a]ir traffic at O'Hare is projected to increase in the future from some 31 million passengers and 922,787 operations in 2002 to some 50 million passengers and 1,194,000 operations by 2018." *Id.* at 634-635 (brackets in original).

In 2001, the City of Chicago announced that it would undertake a multi-year modernization project designed to reduce delays and increase capacity at O'Hare. *St. John's*, 502 F.3d at 620. The project involves reconfiguring several runways into a more effective runway architecture that would "permit a constant stream of take-offs and landings." *Ibid.* The City of Chicago determined that the runway reconfiguration would require it to acquire 433 acres of nearby land, including St. Johannes Cemetery, which is owned by petitioner St. John's United Church of Christ. *Id.* at 620-621. The City plans to relocate the cemetery. *Id.* at 621.

b. In December 2002, the City of Chicago submitted an airport layout plan detailing the proposed modernization to the FAA for review. Pet. App. 19a; see 49 U.S.C. 47107(a)(16) (requiring airport owner to obtain approval

of any revision to its airport layout plan before that revision takes effect). In September 2005, the FAA issued a 492-page Record of Decision (ROD) approving the City's airport layout plan. Pet. App. 21a. In the ROD, the FAA reviewed the plan and compared the plan to a variety of alternatives. *Id.* at 19a. After narrowing its consideration to four plausible alternatives, the FAA performed a number of computer simulations to determine "how well each alternative would enhance capacity and reduce delays." *Ibid.* The FAA concluded that the City's plan would result in the shortest average delay and $150 million in savings in the five years following construction, making the plan "clearly preferable to all others." *Id.* at 19a-20a.

Petitioners had informed the FAA that they believed that the City's plan to relocate the cemetery substantially burdened their religious exercise in violation of RFRA. Pet. App. 20a. Although the FAA "express[ed] uncertainty over whether it was required to comply with RFRA * * * because the City"—and not a federal agency—"was ultimately responsible for designing and implementing the expansion plan," it decided, in an abundance of caution, to analyze the City's plan as if RFRA did apply. *Ibid.* The FAA determined that, even if relocation of the cemetery would substantially burden petitioners' religious practices, no less restrictive alternative could further the compelling governmental interests in reducing delay and enhancing capacity at O'Hare. ROD 92-95, 97-103.[1]

A few months after issuing the ROD, the FAA issued a non-binding letter of intent to provide the City with

---

[1] The ROD is available at <http://ohare.com/rod/ORD_ROD_Final.pdf>.

approximately $337 million in federal funds over fifteen years for the modernization project. Pet. App. 21a.

3. Petitioners filed petitions for review of the ROD and the letter of intent in the D.C. Circuit.

The court of appeals denied the petitions for review. Pet. App. 15a-61a. The court first rejected petitioners' argument that the FAA's approval of the airport layout plan violated RFRA. *Id.* at 21a-40a. The court explained that, because the FAA is subject to RFRA but the City of Chicago is not, petitioners were required to demonstrate that any burden on their religious exercise caused by the modernization project was attributable to the FAA, rather than to the City. *Id.* at 24a-27a. The court explained that "[m]ere approval of or acquiescence in" the City's plan would not be sufficient to demonstrate that the FAA was the source of any burden on religious exercise. *Id.* at 31a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)). And the court observed that "receipt of public funds, even of 'virtually all' of an entity's funding, is not sufficient to fairly attribute the entity's actions to the government." *Ibid.* (quoting *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 840-841 (1982)).

The court concluded that "the FAA's peripheral role in the City's relocation of [the cemetery] is not sufficient to hold the agency responsible for purposes of RFRA," because the FAA merely approved the plan; it did not design the plan and cannot compel the City to implement some or all of the plan. Pet. App. 32a-33a. Moreover, the court noted, "[t]he City will provide the lion's share of the funding for the modernization project" and "intends to provide all of the funding through other sources if the federal funds are not forthcoming." *Id.* at 33a. The court also expressed concern that holding the FAA responsible for a project designed and implement-

ed by the City would permit an end-run around this Court's decision in *City of Boerne*, which made clear that the RFRA does not apply to States and their subdivisions, 521 U.S. at 532-536. See Pet. App. 39a-40a.

The court of appeals also rejected petitioners' challenges to the FAA's letter of intent. Pet. App. 40a-45a. The court explained that the letter was not a final agency order subject to judicial review; it was merely "a planning document" that "has no effect absent two conditions precedent: FAA approval of a further grant application by the City and congressional appropriation of funds." *Id.* at 41a-43a. In any event, the court determined, petitioners did not have standing to challenge the FAA's issuance of the letter of intent because invalidating that decision would not redress petitioners' claimed injury. *Id.* at 43a-45a. The court explained that the letter of intent concerned only a small fraction of the funds required for the modernization project, and the City had demonstrated that if those funds were not available from the FAA, the City would proceed with alternate sources of funding, such as revenue bonds. *Id.* at 44a-45a.

Finally, the court of appeals rejected petitioners' various procedural challenges to the ROD. Pet. App. 45a-51a.

Petitioners did not seek this Court's review of the court of appeals' decision.

4. In the meantime, petitioners sued the City of Chicago, the State of Illinois, various state and local officials, and the FAA in federal district court to block the modernization project. The district court dismissed the complaint. See *St. John's United Church of Christ* v. *City of Chi.*, 401 F. Supp. 2d 887 (N.D. Ill. 2005), aff'd, 502 F.3d 616 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008).

The court of appeals affirmed. See *St. John's United Church of Christ* v. *City of Chi.*, 502 F.3d 616 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008). As relevant here, the court of appeals rejected petitioners' claims that the City, State, and various city and state officials violated the First Amendment, the Equal Protection Clause, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, and the Illinois Religious Freedom Restoration Act (IRFRA), 775 Ill. Comp. Stat. Ann. 35/1 *et seq.* (West 2000 & Supp. 2009). See *St. John's*, 502 F.3d at 630-642. Although the court of appeals determined that the IRFRA did not apply to petitioners' claims by its terms, it also held that, if IRFRA did apply, the City's airport layout plan represented the least restrictive alternative that would further the compelling governmental interests in reducing delay and enhancing capacity at O'Hare. *Id.* at 636.

The court of appeals considered only the claims petitioners raised against state and municipal defendants, and not those against the FAA, because it determined that petitioners' "claims against the [FAA] were resolved in the FAA's favor by the court of appeals for the District of Columbia Circuit" in the prior litigation. *St. John's*, 502 F.3d at 619; see *id.* at 619 n.1.

Petitioners filed a petition for a writ of certiorari, which was denied. See 128 S. Ct. 2431 (2008).

5. The FAA then approved a grant of $29.3 million in federal Airport Improvement Program funds for the modernization project. Pet. App. 62a, 64a. Petitioners filed a petition for review of the grant in the D.C. Circuit, arguing, *inter alia*, that the grant violated RFRA. *Id.* at 65a.

The court of appeals dismissed the petition for review. Pet. App. 62a-68a. The court explained that peti-

tioners failed to demonstrate two essential requirements for standing—that the FAA's grant to the City Chicago caused petitioners' claimed injuries and that a favorable decision from the court of appeals would redress those injuries. *Id.* at 65a-68a. The court determined that petitioners failed to show causation because the "grant reimburses Chicago for completed work that did not affect [them]." *Id.* at 65a. The court also determined that petitioners' claimed injury was not redressable because the FAA "cannot compel Chicago to complete the O'Hare project" and because "Chicago will provide most of the funding and is prepared to obtain funding from other sources if federal money is unavailable." *Id.* at 67a.

The FAA then authorized another grant for the modernization project, and petitioners filed a petition for review of the grant.

The court of appeals also dismissed that petition for review for lack of standing, explaining that petitioners failed to demonstrate causation and redressability. See *St. John's United Church of Christ* v. *FAA*, No. 07-1435 (D.C. Cir. July 14, 2008) (per curiam).

Petitioners did not seek this Court's review of either decision.

6. Petitioners then brought the instant case, which concerns the FAA's approval of certain passenger-facility charges (PFCs). PFCs are ticket charges, collected from airplane passengers by commercial airlines and remitted to an airport owner such as the City of Chicago for use on eligible airport-related projects. See 49 U.S.C. 40117(a)(3)(A), (b)(1) and (4), and (i)(2)(A); 14 C.F.R. 158.41; see also Pet. App. 5a-6a. PFCs are non-federal, local revenue. See Pet. App. 5a; see also, *e.g.*, 14 C.F.R. 158.3, 158.5, 158.13; 56 Fed. Reg. 24,254 (1991) ("PFC revenue is local money."); *Illinois Dep't of*

Transp. v. *Hinson*, 122 F.3d 370, 372 (7th Cir. 1997) ("PFC revenues belong to the agency levying the charges, here the City of Chicago.").

An airport operator must obtain approval from the FAA before imposing PFCs. See 49 U.S.C. 40117(d); 14 C.F.R. 158.5; see also Pet. App. 6a. The FAA is authorized to approve an application to impose PFCs to fund a specific project if it finds that the amount and duration of the PFC is not more than necessary to finance the project; that the application provides adequate justification for the project; and that the project is an eligible airport-related project that will preserve or enhance safety, capacity, or security, reduce noise, or provide an opportunity for enhanced competition between or among air carriers. 49 U.S.C. 40117(d); see Pet. App. 6a.

The City of Chicago sought FAA authorization to impose and use PFCs for four projects that are part of the O'Hare modernization project. Pet. App. 6a. In September 2007, the FAA issued a final agency decision authorizing the City to impose and use those PFCs. *Id.* at 1a. Petitioners filed a petition for review of that decision, arguing that the FAA's approval of certain PFCs violated the RFRA and was arbitrary and capricious.

7. The court of appeals dismissed in part and denied in part the petition for review. Pet. App. 1a-12a.

The court of appeals dismissed the portion of the petition for review that raised a RFRA claim, holding that petitioners failed to establish Article III standing to raise that claim. Pet. App. 2a-4a. Petitioners argued that the FAA's approval of PFCs to partially fund the construction of a runway substantially burdens their exercise of religion because that requires relocating their cemetery contrary to their belief that the remains

of their co-religionists must remain undisturbed. *Id.* at 2a. The court determined that, even if petitioners could show a legally cognizable injury that was caused by the FAA's approval of the PFCs, petitioners failed to demonstrate redressability, because they did not show "that in the absence of PFCs Chicago would leave the cemetery alone." *Id.* at 2a-3a.

The court determined that the City has several alternative sources of funds to draw upon to finish the modernization project in the absence of PFCs. Pet. App. 3a-4a. The court found, for example, that the City could seek funding from its own tax base or issue bonds to pay for the project. *Ibid.* The court rejected petitioners' argument that the City could not raise taxes because it had made a political promise not to do so, because such a promise has "no legal force whatsoever." *Id.* at 3a. And the court rejected petitioners' argument that the City could not issue bonds because the airlines would not approve them, explaining that airline approval is not required for bonds on which principal and interest are payable from airport revenue after the existing airline agreements terminate. *Id.* at 3a-4a. "In fact," the court noted, the City "has already issued hundreds of millions of dollars worth of such bonds" and "[p]resumably it can do so again." *Id.* at 4a.

The court also determined that the City could attempt to renegotiate with the airlines to issue airline-backed bonds if the modernization project was in jeopardy. Pet. App. 4a. The court explained that the prospect of such "renegotiations with the airlines would not create a significant increase in the likelihood that the project would be scuttled altogether rather than merely delayed." *Ibid.* (internal quotation marks omitted). For all of those reasons, the court of appeals concluded that

petitioners "have not shown the requisite substantial probability that any order of ours could redress their injury." *Ibid.* (internal quotation marks omitted).

The court of appeals then dismissed petitioners' arguments that the FAA failed to comply with various statutory and regulatory requirements in authorizing the PFCs. Pet. App. 5a-11a.[2]

8. Petitioners sought rehearing and rehearing en banc of the court of appeals' decision. The court denied rehearing and rehearing en banc, with no judge requesting a vote on the petition. Pet. App. 13a-14a.

ARGUMENT

Petitioners seek review (Pet. 4-6) of the court of appeals' determination that they lack standing to challenge the FAA's approval of certain PFCs because a favorable decision would not redress their claimed injuries. Petitioners' disagreement with the court of appeals' application of settled legal principles to the facts of this case does not warrant this Court's review. The court of appeals' decision is correct, and it does not conflict with the decision of any other court of appeals or of this Court. Moreover, this case would be a poor vehicle to review the question of redressability because petitioners lack standing for other reasons and their RFRA claim fails in any event. Further review therefore is unwarranted.

1. Petitioners argue that "[t]aken together," the court of appeals' denial or dismissal of their claims in four separate cases have "devastating implications for RFRA." Pet. 5-6; see Pet. 4-7, 23-24. But the only ruling that is at issue here is the court of appeals' most recent determination, which is that petitioners lack *stand-*

[2] Petitioners do not renew those arguments before this Court.

ing to challenge the FAA's approval of the City's plan to collect PFCs to fund portions of the modernization project. See Pet. App. 1a-12a. The D.C. Circuit did, in three prior cases, reject other challenges petitioners brought to actions taken by the FAA in the context of the O'Hare modernization project. But petitioners did not seek review of any of those decisions in this Court. Accordingly, the only question presented by the petition is whether the court of appeals correctly held that petitioners lacked standing to challenge the FAA's approval of the PFCs on RFRA grounds. See Pet. 11 (acknowledging that "the subject of this Petition * * * is the Court of Appeals' December 19, 2008 determination").

2. The court of appeals' decision is correct. As the court explained, petitioners were required to demonstrate injury, causation, and redressability to establish standing. Pet. App. 3a. Petitioners' theory was that PFCs were "essential[] * * * to fund the runway project and concomitant destruction of the St. Johannes cemetery" and without the PFCs, the runway project would not proceed. *Ibid.*

To demonstrate redressability, the court of appeals observed, petitioners were required to show that the practical consequence of invalidating the PFCs would be a significant increase in the likelihood that petitioners would obtain relief that directly redresses their claimed injury. Pet. App. 4a (citing *Utah* v. *Evans*, 536 U.S. 452, 464 (2002)). Here, because petitioners' "asserted injury arises from the [federal] government's allegedly unlawful regulation (or lack of regulation) of *someone else*," redressability "hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

After reviewing the evidence in the record, the court of appeals concluded that the City of Chicago likely would proceed with the already-in-progress, multi-billion-dollar modernization project even in the absence of the PFCs. Pet. App. 2a-4a. In particular, the court determined that City of Chicago has numerous sources of funding that do not require federal approval, such as increased taxes and general airport revenue bonds. *Id.* at 3a-4a; see Gov't C.A. Br. 21-22. That is precisely the conclusion the court had already reached twice in prior litigation between these parties, when the court explained that "Chicago will provide most of the funding" for the modernization project, and it "is prepared to obtain funding from other sources if federal money is unavailable." Pet. App. 67a; see also *id.* at 43a-45a. And it reflects the fact that it is the City of Chicago, not the FAA, that designed the project, is implementing the project, and ultimately is responsible for the project. *Id.* at 33a.

Petitioners contend (Pet. 17) that their injury is redressable because "it is highly likely that Chicago would follow the direction of the FAA that is consistent with any relief ordered by a court pertaining to RFRA issues." They are mistaken. There is no reason to believe that a federal court order invalidating the PFCs would cause the City of Chicago to change its plans to accommodate the cemetery. That is because the effect of such an order would be to make one certain source of local funds (PFCs) unavailable for the project, not to invalidate the modernization project or the runway reconfiguration. The City has had approval to proceed with the cemetery relocation for many years, since the FAA approved the airport layout plan, ROD 116-117, the court of appeals upheld that approval against petitioners' chal-

lenges, Pet. App. 15a-61a, and petitioners did not seek further review. Indeed, the City of Chicago has relied on finality of the decisions approving the modernization project and has made significant progress in the runway reconfiguration part of the project.[3]

Moreover, there is no basis to assume that the FAA would "direct" the City to suspend the cemetery relocation if the court of appeals sustained a RFRA challenge to the FAA's approval of PFCs. Because the FAA already has approved the modernization project, the only action it could take would be to withhold approval for PFCs. But, as the court of appeals explained, the City of Chicago would have adequate alternative sources of funds to proceed with the project even in the absence of PFCs. Pet. App. 4a-6a.

Petitioners do not take issue with the court of appeals' determination that the City could raise the necessary funds though tax revenues, and they are flatly wrong to suggest (Pet. 21 n.5) that the City may not is-

---

[3] Petitioners are mistaken in asserting (Pet. 17) that, because the City of Chicago modified the airport layout plan to avoid Rest Haven Cemetery in advance of FAA's approval of the ROD, the City now would necessarily alter the approved airport layout plan if PFCs were unavailable. The City determined that it could avoid relocating Rest Haven to make way for cargo areas because the planned location of the cargo areas was not essential to the project. *St. John's*, 502 F.3d at 625-626. But the City came to the opposite conclusion for the cemetery at issue here, because it is located in an area that is essential to the runway reconfiguration. *Id.* at 635-636 ("[G]eography and the needs of the expansion project made it impossible * * * to accommodate the St. Johannes cemetery" in the way that the City was able to accommodate Rest Haven.). And the City has relied on the FAA's approval of the airport layout plan; it has completed three of the four projects for which PFCs were approved on the assumption that the runway at issue will be constructed.

sue bonds without airline backing. See Pet. App. 3a-4a; see also C.A. App. 5422-5452, 5453-5526, 9594-9595 (under current Airport Use Agreement and Terminal Facilities Lease, City may issue—and has issued—revenue bonds for which debt servicing is provided not by the airlines directly but from airport revenues collected after the use agreement expires). In light of those alternative sources of funding, as well as the City's commitment to complete this important multi-year modernization project, the court of appeals correctly held that a decision invalidating the PFCs would not redress petitioners' claimed injury.

3. Petitioners' argument amounts to a disagreement with the court of appeals' application of settled legal principles to the facts of this particular case, which does not warrant this Court's review. The court of appeals did not state any new legal standard for redressability; instead, it applied this Court's settled precedents to these particular facts. Indeed, the legal standard petitioners urge for redressability—that they must show the practical consequence of invalidating the PFCs would be a significant increase in the likelihood that they would obtain relief (Pet. 16-18)—is precisely the same standard utilized by the court of appeals. See Pet. App. 4a (citing *Evans*, 536 U.S. at 464); see also *id.* at 43a (same).

Petitioners do not contend that the decision below conflicts with the decision of any other court of appeals, and their claim (Pet. 17-18) that the decision below conflicts with two decisions of this Court lacks merit. In both *Franklin* v. *Massachusetts*, 505 U.S. 788 (1992), and *Utah* v. *Evans*, 536 U.S. 452 (2002), this Court considered whether a State had standing to challenge a counting method used in the census because the State

would obtain additional representation in Congress if the census bureau used its preferred counting method. *Evans*, 536 U.S. at 460-461; *Franklin*, 505 U.S. at 790-791; *id.* at 801-802 (opinion of O'Connor, J.). The particular question in each case was whether the State's claimed injury would be redressable by a decision invalidating the counting method used by the census bureau, in light of the fact that other steps would be required before the State would obtain the additional representation in Congress it sought. *Evans*, 536 U.S. at 463-464; *Franklin*, 505 U.S. at 802-803 (opinion of O'Connor, J.). This Court held in both cases that the States had demonstrated redressability, because it was "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision." *Evans*, 536 U.S. at 464 (quoting *Franklin*, 505 U.S. at 803 (opinion of O'Connor, J.)); see *Franklin*, 505 U.S. at 802-803 (opinion of O'Connor, J.); *id.* at 807 (Stevens, J., concurring in part and concurring in the judgment). The *Evans* Court explained that the Court's invalidation of the counting method used would mean that the Secretary of Commerce would issue a revised census report to the President, the President would transmit it to Congress, and Congress would use that report to determine the number of Representatives to which each State is entitled. *Evans*, 536 U.S. at 460-464. As the Court noted, each of those steps is required by statute, *id.* at 461-462, and the Court reasonably could presume that they would be performed, *id.* at 463-464.

Evans and *Franklin* do not conflict with the decision below. In those cases, executive and congressional officials were presumed to carry out the statutory responsibilities that would result from a court decision invalidat-

ing a decision of the Secretary of Commerce. Here, the only result of invalidation of the PFCs would be that the City cannot raise funds for one runway project that is part of modernization program by assessing those fees on passengers. It does not mean that the City would be precluded from carrying out the modernization project; the City's authority to carry out that project was established long ago. And this is not, as petitioners claim (Pet. 19), a question of whether the City would attempt to "evade an adverse decision" from a federal court. Although a federal court may determine that the City cannot collect PFCs to fund the modernization project, it cannot force the City to abandon its plan to relocate the cemetery, both because RFRA is not applicable to the City, see *City of Boerne* v. *Flores*, 521 U.S. 507, 532-536 (1997), and because the City already has obtained a final judgment allowing it to relocate the cemetery. Petitioners therefore cannot demonstrate that a favorable decision would stop the city from relocating the cemetery.

The court of appeals assessed redressability using the very same standard set out in *Franklin* and *Evans*, demonstrating its fidelity to the legal rules set out in those cases. See Pet. App. 4a (citing *Evans*, 536 U.S. at 464); see also *id.* at 43a (same). The fact that the court of appeals came to a different conclusion on markedly different facts does not demonstrate a conflict with a legal rule announced by this Court.

4. Petitioners' remaining arguments lack merit. Contrary to petitioners' contention (Pet. 23), the court of appeals did not "effectively eviscerate RFRA protection in all cases where the federal government either exercises permit approval authority or provides federal funding assistance for actions by non-federal parties

that injure religion." That is because this case does not address either federal permit approval authority or federal funding. Petitioners lost their challenge regarding federal permit authority in 2006 and declined to seek further review. See Pet. App. 15a-61a. And this case does not address whether federal funding makes a city's actions in modernizing an airport attributable to the federal government, because PFCs are not federal funds. Rather, they are charges collected from passengers by the airlines and held by the airport to finance specific projects. See *id.* at 5a-6a; see also, *e.g.*, 14 C.F.R. 158.3, 158.5, 158.13; 56 Fed. Reg. 24,254 (1991); *Hinson*, 122 F.3d at 372. The fact that the FAA approves collection of PFCs does not somehow federalize what is indisputably an action by the City of Chicago.

There is likewise no merit to petitioners' claim (Pet. 24-26) that the decision below would "eviscerat[e] * * * many important environmental laws." The court below did not address requirements for standing under any environmental laws.[4] Nor did petitioners bring any challenge in the court below to the modernization project based on the environmental laws. And they cite no disagreements in the circuits in environmental cases that would be affected by the court of appeals' application of settled standing principles to the facts of this particular case.

5. This case would present a poor vehicle to review the question presented in any event.

---

[4] In particular, the court of appeals did not hold "that there is no Article III jurisdiction for seeking enforcement of federal statutory requirements involving federal funding," Pet. 26, both because the court did not state any such broad rules of law, and because this case does not concern federal funds. See pp. 15, 17-18, *supra*.

Even if petitioners could show redressability, they would lack standing because they cannot demonstrate that the City of Chicago's acquisition and relocation of the cemetery is fairly traceable to the FAA's decision to authorize collection of PFCs. See Gov't C.A. Br. 21. The City obtained approval of the airport layout plan in 2005, and that approval allows it to proceed with the cemetery relocation. Moreover, the four projects for which PFCs were approved will not cause petitioners' claimed injuries, because cemetery relocation was not a part of any of those four projects. See *id.* at 11-12, 21; City C.A. Br. 15; see also C.A. App. 9561-9564 (detailing work that will be done on runway at issue using PFCs, which does not include cemetery relocation).

Even if petitioners had standing, they could not demonstrate that RFRA applies to the FAA's approval of PFCs. As the court of appeals explained in the context of petitioners' challenge to the ROD, petitioners have failed to show that any burden on petitioners' religious exercise caused by the modernization project is attributable to the FAA, rather than to the City of Chicago. Pet. App. 24a-27a. Neither "[m]ere approval of or acquiescence in" the City's plan, *id.* at 31a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)), nor "receipt of public funds," *ibid.*, is sufficient to attribute a local project to the federal government. Here, the FAA's approval of the collection of PFCs (which are not federal funds) is merely a "peripheral role in the City's relocation of [the cemetery] is not sufficient to hold the [FAA] responsible for purposes of RFRA." *Id.* at 33a. The FAA did not design the plan and cannot compel the City to implement some or all of the plan and the City is responsible for funding and implementing the plan. *Ibid.* As the court of appeals recognized, to apply RFRA to

the City's modernization project under these circumstances would permit an unconstitutional end-run around *City of Boerne*. *Id.* at 39a-40a.

Finally, and in any event, even if RFRA applied to the City's project, the PFCs would not be invalidated. As the FAA and the Seventh Circuit both have concluded after careful deliberation, the modernization project is narrowly tailored to further the compelling governmental interests in reducing delays and increasing capacity at one of our Nation's most vital transportation centers. See *St. John's*, 502 F.3d at 634-636; ROD 92-103.[5] Petitioners therefore are extremely unlikely to prevail regardless of how this Court resolves the question presented.

---

[5] Moreover, petitioners' RFRA claim likely would be precluded under res judicata and collateral estoppel principles because the courts of appeals already have decided that "the relocation of St. Johannes Cemetery cannot be fairly attributed to the actions of the FAA," Pet. App. 39a-40a, and that the modernization project is narrowly tailored to further the compelling governmental interests underlying the project, *St. John's*, 502 F.3d at 634-636. See Gov't C.A. Br. 22-26; see also *St. John's*, 502 F.3d at 619 & n.1 (observing that petitioners' claims against the FAA previously were resolved in the FAA's favor in the D.C. Circuit).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
JOHN CRUDEN
Acting Assistant Attorney General
M. ALICE THURSTON
Attorney

AUGUST 2009

(4)

No. 08-1447

Supreme Court, U.S.
FILED
AUG 24 2009
CLERK

IN THE

Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,

Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and RANDY BABBITT, Administrator, and CITY OF CHICAGO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONERS

JOSEPH V. KARAGANIS
Counsel of Record
A. BRUCE WHITE
JOHN W. KALICH
KARAGANIS, WHITE & MAGEL LTD.
414 N. Orleans Street, Suite 810
Chicago, Illinois 60654
(312) 836-1177

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. *EVANS* AND *FRANKLIN* CLEARLY ESTABLISH REDRESSABILITY 1

II. RESPONDENTS' OTHER ARGUMENTS ARE MERITLESS. 6

A. Prior Federal RFRA Litigation. 6

B. Respondents' Segmentation Argument Is Meritless. 8

C. "State Action" And The Spending Power. 9

D. There Has Been No RFRA Strict Scrutiny Determination. 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Bennett v. Kentucky Department of Education, 470 U.S. 656 (1985) 4

Blum v. Yaretsky, 457 U.S. 991 (1982) 10

City of Boerne v. Flores, 521 U.S. 507 (1997) 11

Franklin v. Massachusetts, 505 U.S. 788 (1992) 1

Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971) 10, 11

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 12

Hills v. Gautreaux, 425 U.S. 284 (1976) 10, 11

National Parks Conservation Association v. Manson, 414 F.3d 1 (D.C. Cir. 2005) 9

New York v. United States, 505 U.S. 144 (1992) 2

Old Town Neighborhood Association, Inc. v. Kauffman, 333 F.3d 732 (7th Cir. 2003) 5

Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981) 4

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 10

Ross v. Federal Highway Administration, 162 F.3d 1046 (10th Cir. 1998) 6

Scottsdale Mall v. State of Indiana, 549 F.2d 484 (7th Cir.1977), *cert. denied*, 434 U.S. 1008 (1978) 6

St. John's United Church of Christ v. City of Chicago, 502 F.3d 616 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2431 (2008) 12

St. John's United Church of Christ v. FAA, No. 07-1435 (D.C. Cir. July 14, 2008) 8

Tozzi v. U.S. Dept. of Health and Human Services, 271 F.3d 301 (D.C. Cir. 2001) 9

Utah v. Evans, 536 U.S. 452 (2002) 1

Village of Bensenville v. FAA, 457 F.3d 52 (D.C. Cir. 2006) 7, 9

Wisconsin v. Yoder, 406 U.S. 205 (1972) 12

Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C. Cir. 1990) 11

STATUTES

49 U.S.C. §46110(a) 6, 7, 9

OTHER AUTHORITIES

Chicago Tribune. "Airlines: Stop O'Hare Expansion." November 8, 2008 15

FAA Order 1050.1E *Environmental Impacts Policies and Procedures* 2, 3

Wright & Miller, Federal Practice & Procedure ¶4436 9

IN THE
Supreme Court of the United States

No. 08-1447

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,
Petitioners,

v.

FEDERAL AVIATION ADMINISTRATION, and RANDY BABBITT, Administrator, and CITY OF CHICAGO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR PETITIONERS

I. *EVANS* AND *FRANKLIN* CLEARLY ESTABLISH REDRESSABILITY.

Much of Respondents' argument centers on the contention that neither Congress nor FAA has authority to condition federally authorized financial assistance to a non-federal recipient on the recipient taking actions to protect interests which Congress wants protected. Building on that erroneous premise, Respondents argue that *Utah v. Evans*, 536 U.S. 452, 463-64 (2002), and *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992), do not

apply because FAA cannot condition federal authorization of $1.282 billion in PFCs on a requirement that Chicago preserve St. Johannes religious cemetery.

Under Respondents' construct, since there is no constitutional authority for Congress (and the FAA) to condition federally authorized funding on a requirement that Chicago protect St. Johannes: FAA is free to ignore federal RFRA; Chicago is free to destroy St. Johannes; and Chicago is free to spend the $1.282 billion without any judicial enforcement of FAA's RFRA obligations.

Respondents are wrong. Under its spending power Congress can empower federal agencies to attach conditions to funding assistance, requiring the non-federal recipient to take action to protect valued resources. *See: New York v. United States*, 505 U.S. 144, 167 (1992).

Consistent with Congress's delegation, FAA has adopted regulations which impose "mitigation" requirements that the non-federal airport operator must fulfill, to protect environmental and other resources:

> Grants, permits, or other approvals ... shall include conditions described in the EIS that require implementation of mitigation adopted by the agency in making its decision...

FAA Order 1050.1E *Environmental Impacts Policies and Procedures,* par. 500a(2) (emphasis added).

FAA bases such mitigation requirements on "special purpose laws":

> Examples of these laws or directives include, but are not limited to actions involving: section 404 of the Clean Water Act; section 4(f) of the DOT Act; section 106 of the National Historic Preservation Act; Marine Mammal Protection Act, section 7 of the Endangered Species Act; section 307 of the Coastal Zone Management Act; and executive orders.

FAA Order 1050.1E *Environmental Impacts Policies and Procedures*, par. 404f, p. 4-7.

These mitigation requirements apply to both FAA grants and PFC authorizations.[1]

FAA has imposed such "mitigation" requirements on Chicago as a condition of funding, including protection of historical resources and a commitment to preserve Rest Haven, another religious cemetery:

> ...FAA will take appropriate steps, as described in this ROD, through Federal funding grant assurances and conditions, and airport layout plan approvals, to ensure that the following mitigation measures, and other impact reduction measures as described herein, are implemented for the selected alternative. * * * The primary

---

[1] Respondents claim that the $1.282 billion in PFCs are "private funds" immune from requirements of federal law. To the contrary, FAA regulations make clear that authorization of PFCs is a federal action. (JA-1793). Thus, FAA must comply with NEPA and numerous other federal protective laws when it makes PFC decisions.

> responsibility for implementation of the mitigation measures lies with the City of Chicago. The FAA will have oversight responsibility and conditions this approval upon implementation of that mitigation.

September 2005 FAA Record of Decision for O'Hare Modernization ("ROD"), p. 44 (JA-4781) (emphasis added); *see also*, ROD Ch. 9; and, ROD Appendix B (JA-4781, JA-5217).

Chicago has explicitly agreed to comply with the conditions and limitations imposed by FAA:

> Mitigation measures for those impact categories where mitigation measures are necessary to avoid or minimize significant environmental impacts, for which the City of Chicago has agreed to implement, as well as identified or adopted monitoring and enforcement programs, are summarized below.

ROD, p. 44 (JA-4781) (emphasis added).

There is no reason to believe that Chicago would ignore protective requirements imposed by FAA. Chicago knowingly and voluntarily accepted the requirements that FAA imposed in furtherance of these "special purpose" laws, as well as the RFRA-based requirement that Chicago protect Rest Haven Cemetery. *See*: *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"); *Bennett v. Kentucky Department of Education*, 470 U.S. 656, 665-66 (1985).

FAA has imposed "mitigation" requirements across the board for all funding actions dealing with the OMP. These are then incorporated separately in the decision document for each grant decision, and also in the PFC decision.

Like the requirement to protect Rest Haven Cemetery, an FAA requirement that Chicago preserve St. Johannes Cemetery would be a condition as well on the future billions of dollars of federally authorized funding Chicago says it needs for the OMP.

Under these facts, the *Evans-Franklin* authority clearly establishes redressability.

There is every reason to believe that rather than foregoing federally approved funding, Chicago would find a way to preserve St. Johannes.

Of course, under the spending clause, Chicago is free to refuse federally authorized financial assistance. But if Chicago does make such a decision, it cannot then take the $1.282 billion in PFC funds and spend it in disregard of requirements imposed by FAA as conditions on the federal funding authorization. Chicago and FAA cannot have it both ways.

Other courts have addressed a non-federal recipient's threat to walk away from the federal funding assistance. The Seventh Circuit gave the non-federal recipient the option to comply with the federal environmental requirements, or to disavow federal funding and forever be barred from receiving federal funds for the project. *Old Town Neighborhood Association, Inc. v. Kauffman*, 333 F.3d 732, 736 (7th Cir. 2003). In other cases, where as here significant federal funds had already been

expended, the non-federal recipient was not allowed to back out of the federal environmental obligation. *Ross v. Federal Highway Administration,* 162 F.3d 1046, 1052-53 (10th Cir. 1998); *Scottsdale Mall v. State of Indiana*, 549 F.2d 484, 489 (7th Cir.1977), *cert. denied,* 434 U.S. 1008 (1978).

II. RESPONDENTS' OTHER ARGUMENTS ARE MERITLESS.

A. Prior Federal RFRA Litigation.

Respondents' suggestion that Petitioners have attempted to abuse the judicial process by multiple filings is disingenuous. The need for separate multiple judicial review proceedings arose from FAA's own insistence: (1) that FAA's decision to approve the ALP was separate and apart from FAA's funding decisions; and (2) that each funding action by FAA is a separate administrative action. FAA has stated:

> ...[T]he PFC and AIP processes are separate and distinct from the NEPA process.

FAA comments in Final EIS (JA-2987, 3050, 3626).

> The decisions to approve AIP and PFC funding are completed in separate processes.

ROD, p. 9 (JA-4742) (emphasis added). Moreover, because FAA made each funding decision on a different date, Petitioners were compelled to file separate petitions for seeking judicial review under the time limitations of 49 U.S.C. §46110(a).

But in fact, Petitioners sought consolidation of related funding proceedings so that the Circuit

Court could address FAA's RFRA obligations comprehensively.

In *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006) (App. 15a), the Circuit Court held that there was no subject matter jurisdiction pursuant to 49 U.S.C. §46110(a) to challenge the FAA's funding Letter of Intent because the LOI was not a final order.

Following *Bensenville*, FAA made three serial funding decisions which required three separate petitions for review: (1) an LOI grant of $29.3 million; (2) the PFC authorization of $1.282 billion; and (3) a second LOI grant of $28.4 million. All of these funds will be used for the same "Phase 1 Airfield" project that will destroy St. Johannes.

Respondents successfully blocked consolidation. By limiting the Circuit Court scrutiny in No. 06-1386 to the first $29.3 million LOI grant, FAA was able to successfully argue that because this grant portion was for a segment of the Phase 1 Airfield which did not physically impact the cemetery, Petitioners had not satisfied the standing causation requirement.

The Circuit Court rejected Petitioners' request to consolidate the $29.3 LOI petition with the $1.282 billion PFC petition, emphasizing that the PFC petition (pending before the Court) was not before the Court in No. 06-1386. Pet. App. 66a ("Nor is the $1.3 billion in PFC's before the court").

Given the Circuit Court's refusal to consolidate review proceedings as to the first LOI grant with the $1.282 billion PFC proceeding, the Court's decision as to the second LOI grant ($28.4 million) was pre-ordained. The Court again ignored the

pending petition challenging the $1.282 billion PFC decision for the same Phase 1 project, and again ruled that Petitioners had not satisfied the standing causation requirement. *St. John's United Church of Christ v. FAA*, No. 07-1435 (D.C. Cir. July 14, 2008) (*per curiam*) (Chicago App. 2a).

B. Respondents' Segmentation Argument Is Meritless.

Reversing its prior segmentation argument, FAA acknowledged in its PFC decision that it is wrong to consider pieces of OMP as isolated segments, to avoid comprehensive consideration of the entire OMP:

> ...[P]rudent environmental analysis calls for a review of the development program on a cumulative basis, rather than a piecemeal review of the development associated with each construction phase. * * * Furthermore, given that each phase is a part of, and makes up, the whole of the development program being studied, it is reasonable to state that the environmental impacts of each phase are included in the environmental impacts of the whole...

FAA FAD on $1.282 billion PFC authorization, p. 43 (JA-9580).

Thus, FAA's and Chicago's continued attempt to split the funding into smaller segments – *i.e.*, by arguing that the hundreds of millions in PFCs spent on construction of Runway 10C/28C (the runway that will destroy St. Johannes) are not at issue because local funds will be used for the actual destruction of the cemetery – is without merit.

Given that FAA now concedes that the components of OMP (and Phase 1) should not be viewed in isolation, it is clear that the standing causation requirement is satisfied. FAA's $1.282 billion PFC authorization plainly is a "substantial factor" in constructing Phase 1 and the related destruction of St. Johannes. *Tozzi v.* U.S. *Dept. of Health and Human Services*, 271 F.3d 301, 308 (D.C. Cir. 2001); *National Parks Conservation Association v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005).[2]

C. "State Action" And The Spending Power.

Respondents' attempt to apply the "state action" reasoning of *Village of Bensenville v. FAA, supra* (on FAA's approval of the ALP), to FAA's authorization of $1.282 billion in PFCs is without merit.

The *Village of Bensenville* discussion as to FAA funding and RFRA compliance was pure *dicta*. Because the Circuit Court had ruled that there was no jurisdiction to review the FAA LOI funding action – due to the absence of a final order required for 49 U.S.C. §46110(a) jurisdiction – there was no FAA funding decision before the Court. Petitioners know of no other case law supporting a "state

---

[2] The three D.C. Circuit rulings of no subject matter jurisdiction for funding challenges in the prior cases do not create *res judicata*. A dismissal for lack of subject matter jurisdiction is no bar to a later action. *See*: Wright & Miller, Federal Practice & Procedure ¶4436. This is especially apparent here, where the $1.282 billion PFC authorization was not even before the Court in the earlier proceedings.

action" requirement for judicial enforcement of statutory responsibilities against a federal agency, where Congress has imposed such obligations on the agency under the spending power.

Nevertheless, to the extent "state action" could be considered relevant to FAA's authorizing $1.282 billion in PFCs, the law is clear that where a federal agency provides funding to a non-federal entity for specific projects which the agency knows are causing injury to federally protected rights, the federal agency can be held responsible.

Respondents argue that a federal agency can provide billions of dollars in federally authorized funding assistance to construct the OMP without the agency being required to comply with RFRA because there was no "state action," under cases such as *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); and *Blum v. Yaretsky*, 457 U.S. 991, 996-98 (1982).

However, in *Blum* and *Rendell-Baker*, the state funding was program-wide. These cases did not involve a state decision approving specific funding for the particular action being challenged. By contrast, here FAA has made a funding decision for a specific project that calls for the destruction of St. Johannes.

A more relevant case is *Gautreaux v. Romney*, 448 F.2d 731, 737-38 (7th Cir. 1971). The Seventh Circuit's finding there – that HUD's funding of Chicago's segregated housing projects created independent constitutional and statutory liability on the federal agency for assisting the non-federal actor – was discussed with approval by this Court in *Hills v. Gautreaux*, 425 U.S. 284 (1976):

> The United States Court of Appeals for the Seventh Circuit reversed and ordered the District Court to enter summary judgment for the respondents, holding that HUD had violated both the Fifth Amendment and §601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. §2000d, by knowingly sanctioning and assisting CHA's racially discriminatory public housing program.

Hills v. Gautreaux, 425 U.S. at 289 (emphasis added).

Gautreaux v. Romney was also cited with approval in *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 749-50 (D.C. Cir. 1990). There, while rejecting an across-the-board challenge to an entire agency funding program, the Circuit Court acknowledged that a federal agency could be held liable for funding a particular project that injured federally protected rights.

Finally, there is nothing in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which prevents FAA from requiring protection of religious rights, as it has for environmental rights. *Boerne* deals with constitutional limitations on congressional power under section 5 of the Fourteenth Amendment. *Boerne* does not prevent the Congress from requiring recipients of federally authorized funding assistance to comply with conditions to protect resources of federal concern, under its spending power.

D. There Has Been No RFRA Strict Scrutiny Determination.

Respondents next argue that even if this Court were to find standing, Petitioners would lose on the merits of a RFRA claim because: (a) FAA conducted a proper strict scrutiny analysis; and (b) the Seventh Circuit applied the strict scrutiny test in addressing Petitioners' First Amendment challenge in a separate case.[3]

Petitioners take no issue with FAA/Chicago's generalized identification of the involved governmental interests: (1) reducing congestion-delay; and (2) increasing capacity. Chicago Br. p. 26; FAA Br. p. 20.

But neither the FAA nor the Seventh Circuit conducted the proper strict scrutiny analysis required under this Court's decisions in *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

Yoder and *Gonzales* both prohibit government agencies from relying on generalized (albeit legitimate) claims of governmental interest. Instead, government must make a particularized demonstration of an incremental difference between pursuing the government's desired action and pursuing a non-destructive alternative that

---

[3] *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 2431 (2008).

rises to the level of a "compelling governmental interest."

The FAA conducted computer modeling studies of three alternatives (and one computer modeling study of the existing O'Hare). All of the alternatives modeled called for destruction of St. Johannes. FAA never performed any computer modeling of non-destructive added runway alternatives – not even merely moving or shortening a runway a few hundred feet – to calculate what level of delay reduction and capacity increase would thus be achieved.[4]

Thus, FAA had no way of knowing whether the incremental difference in aviation performance (*i.e.*, delay reduction and capacity increase) between FAA's Preferred Alternative and any non-destructive alternatives is 1%, 10%, 20% or 50%. Without this information, FAA had no way of concluding that the incremental difference in aviation performance between FAA's Preferred Alternative and any new runway alternatives which would not destroy St. Johannes rises to the level of a "compelling governmental interest." Consequently there is no basis for Respondents' claim that the FAA satisfied the strict scrutiny test.

---

[4] Contrary to Chicago's suggestion that any non-destructive alternatives were unsafe, FAA concedes that several of the non-destructive alternatives (developed by former senior FAA air traffic experts) "were determined to be capable of being implemented and operated safely." FAA FAD, PFC No. 62, p. 69 (JA-9606) (emphasis added).

Nor does the *dicta* in Judge Wood's Seventh Circuit opinion satisfy the incremental strict scrutiny analysis required by *Yoder* and *Gonzales.* Judge Wood's excursion into strict scrutiny was done without a trial record. Despite numerous disputed issues of fact, Judge Wood ignored (over the objections of the dissenting judge) the issues of fact presented by the pleadings and simply based her conclusory statements on her reading of portions of the flawed assertions of the FAA.

Judge Wood never conducted the incremental analysis required by *Yoder* and *Gonzales.* Thus, Judge Wood had no basis for concluding whether the incremental difference between FAA/Chicago's Preferred Alternative and any of the non-destructive new runway alternatives, in the amount of delay reduction and capacity increase, rose to the level of a compelling governmental interest to justify the destruction of St. Johannes Cemetery.

CONCLUSION

For over 150 years St. John's has tenaciously guarded its "exercise of religion," holding to a fundamental belief that St. Johannes' consecrated graves must remain undisturbed until Judgment Day.

This Court in *Gonzales* told the nation's religious community that RFRA meant what it said and that courts had a constitutional obligation to enforce RFRA's protection.

There is time and space for RFRA compliance. The major O'Hare airlines have questioned the aviation need to go forward with the remainder of

the OMP. November 8, 2008, *Chicago Tribune.* "Airlines: Stop O'Hare Expansion." Of the $14.29 billion cost for OMP, less than 25% has been expended.

For the reasons stated in the petition and this reply, the petition for certiorari should be granted.

Respectfully submitted,

Joseph V. Karaganis*
A. Bruce White
John W. Kalich
Karaganis, White &
Magel Ltd.
414 N. Orleans Street,
Suite 810
Chicago, Illinois 60654
(312) 836-1177

*Counsel of Record Counsel for Petitioners